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. 84-1538-ASX
atus: GRANTED

Title: Alexandra Fisher, et al., Appellants
v.
City of Berkeley, California, et al.

cketed:
rch 27, 1985

Court: Supreme Court of California

Counsel for appellant: Parrinello,James R., Donnici,Peter J.

Counsel for appellee: Tribe,Laurence H.

try	Date	Note	Proceedings and Orders
1	Mar 27 1985	G	Statement as to jurisdiction filed.
2	Mar 27 1985		Appendix of appellant Alexandra Fisher, et al. filed.
3	Apr 26 1985	G	Motion of California Association of Realtors for leave to file a brief as amicus curiae filed.
4	Apr 26 1985	G	Motion of California Building Industry Association for leave to file a brief as amicus curiae filed.
5	Apr 27 1985		Brief amicus curiae of California Apartment Association filed.
6	Apr 27 1985		Motion of appellees Berkeley, CA, et al. to dismiss or affirm filed.
7	May 1 1985		DISTRIBUTED. May 16, 1985
8	Apr 26 1985	G	Motion of California Chamber of Commerce for leave to file a brief as amicus curiae filed.
9	Apr 26 1985	G	Motion of Western Mobilehome Association for leave to file a brief as amicus curiae filed.
10	May 10 1985	X	Reply brief of appellants Alexandra Fisher, et al. filed.
11	May 20 1985		Motion of California Chamber of Commerce for leave to file a brief as amicus curiae GRANTED.
12	May 20 1985		Motion of Western Mobilehome Association for leave to file a brief as amicus curiae GRANTED.
14	May 17 1985		REDISTRIBUTED. May 23, 1985
15	May 28 1985		Motion of California Association of Realtors for leave to file a brief as amicus curiae GRANTED.
16	May 28 1985		Motion of California Building Industry Association for leave to file a brief as amicus curiae GRANTED.
17	May 28 1985		PROBABLE JURISDICTION NOTED. limited to Question 1 presented by the statement as to jurisdiction. The appeal as to Question 2 presented by the statement as to jurisdiction is dismissed for want of a substantial federal question.
			**********
19	Jun 17 1985		Order extending time to file brief of appellant on the merits until August 1, 1985.
21	Jun 17 1985		Order extending time to file brief of appellee on the merits until September 12, 1985.
22	Jun 28 1985		Judgment issued as to Question II only.
23	Jul 26 1985		Brief amicus curiae of Pacific Legal Foundation, et al. filed.
24	Jul 1 1985		Brief amicus curiae of Washington Legal Foundation filed.
25	Aug 1 1985		Brief amicus curiae of Coalition for Competition in Apartment Rentals filed.

. 84-1538-ASX

try	Date	Note	Proceedings and Orders
6	Aug 1 1985		Brief amicus curiae of California Housing Council, Inc. filed.
7	Aug 1 1985		Brief amicus curiae of California Apartment Assn. filed.
8	Aug 1 1985		Brief of appellants Alexandra Fisher, et al. filed.
0	Aug 1 1985		Joint appendix filed.
1	Aug 2 1985		Brief amicus curiae of National Apartment Association, et al. filed.
2	Aug 1 1985		Brief amicus curiae of Mid-America Legal Foundation filed.
3	Aug 1 1985		Brief amicus curiae of Berkeley Property Owners Association filed.
4	Sep 11 1985		SET FOR ARGUMENT. Tuesday, November 12, 1985. (3rd case).
5	Sep 12 1985		Brief of appellee Berkeley, CA filed.
6	Sep 12 1985		Brief amicus curiae of Cities of Santa Monica, et al. filed.
7	Sep 12 1985		Brief amicus curiae of NJ Department of the Public Advocate filed.
8	Sep 12 1985		Brief amicus curiae of United Conference of Mayors, et al. filed.
9	Sep 18 1985		CIRCULATED.
0	Sep 12 1985	X	Brief amicus curiae of City & County of San Francisco filed.
1	Oct 2 1985	D	Motion of appellants for divided argument to permit California Apartment Association to present oral argument as amicus curiae filed.
2	Oct 15 1985		Motion of appellants for divided argument to permit California Apartment Association to present oral argument as amicus curiae DENIED.
3	Oct 18 1985		Record filed.
4	Nov 4 1985	X	Reply brief of appellants Alexandra Fisher, et al. filed.
5	Nov 12 1985		ARGUED.

84-1538

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,

Appellees.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a local ordinance which establishes ceilings on the price which property owners may charge for rental housing unconstitutional under the supremacy clause because it is in conflict with and thus preempted by the Sherman Act?

(a) Does the California Supreme Court's creation of a "public welfare" defense erroneously permit municipalities to give prevailing weight to their local concerns in defiance of specific congressional antitrust enactments which mandate a national pro-competition policy?

(b) May a municipality mandate landowners to fix rental rates in the absence of any clearly articulated and affirmatively expressed state policy and any active state supervision of the anticompetitive local program?

(c) Does the decision below fail to follow this Court's rulings which recognize that governmentally imposed vertical price maintenance is a per se violation of the Sherman Act and is thus unconstitutional under the supremacy clause?

(d) Is a local rent control ordinance protected from preemption by existing state legislation which is, at best, neutral on the subject of rent control.

2. Does a rent control law which restricts landowners to a limited return on their original investment, without regard to the appreciated value of their property, constitute a taking under the fifth and fourteenth amendments?

PARTIES TO THIS APPEAL

Appellants Alexandra Fisher, Marguerite Jacobs, Mort Baker, Richard Lawhorn, and Anthony Kershaw, all individual rental property owners, and Levin-Zemel, a California corporation, were plaintiffs and appellants in the courts below.

Appellees City of Berkeley, California, a municipal corporation, the Berkeley City Council and the Berkeley Rent Stabilization Board, were defendants and appellees in the courts below. There were no other parties.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THIS APPEAL	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTIONAL BASIS	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
I. THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL	7
A. The Ordinance Impermissibly Conflicts With And Is Preempted By The Sherman Act.	7
B. The Ordinance Denies Landowners Any Return on The Value of Their Property	8
II. THE RULING OF THE CALIFORNIA SUPREME COURT FAILS TO RECOGNIZE THAT THE BERKELEY RENT-FIXING SCHEME IS IN DIRECT CONFLICT WITH AND PREEMPTED BY SECTION 1 OF THE SHERMAN ACT	9
A. The Ruling Below Ignores This Court's Precedents Which Unequivocally Establish That Governmentally Imposed Price-Fixing, Not Exempt As "State Action," Is Preempted By Federal Antitrust Statutes	10
B. The Ruling Belows Ignores The Carefully Developed Standards Established By This Court In Determining Whether Municipal Action Violates Federal Antitrust Statutes	15
C. The California Supreme Court Developed Its Own Unprecedented Test For Determining The Validity Of Municipal Anticompetitive Action	19
III. THE ORDINANCE IS CONFISCATORY	22
A. Landowners Are Denied Any Return On The Value Of Their Property As Of The Date Rent Control Is Imposed	22
B. The Ordinance Freezes Rents and Subjects Landowners To Confiscation Caused By Inflation	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES	PAGE(S)
Agins v. *City of Tiburon*, 24 Cal.3d 266, 175 Cal.Rptr. 372, 598 P.2d 25 (1979), *aff'd*, 447 U.S. 255 (1980)	22
Albrecht v. *Herald Co.*, 390 U.S. 145 (1968)	10, 12
Arizona v. *Maricopa County Med. Soc'y.*, 457 U.S. 332 (1982)	11
Birkenfeld v. *City of Berkeley*, 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001 (1976)	26
Broadcast Music, Inc. v. *CBS*, 441 U.S. 1 (1979)	13
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*,445 U.S. 97 (1980)	9, 10, 12, 13, 16, 18
Cardinale v. *Louisiana*, 394 U.S. 437 (1969)	6
Chambers v. *Mississippi*, 410 U.S. 284 (1973)	6
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978)	9,12,13,14,16,17, 18
Coates v. *City of Cincinnati*, 402 U.S. 611 (1971)	3
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982)	7, 9, 12, 13, 16, 17, 18
Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975)	3
Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926)	22
Fisher v. *City of Berkeley*, 37 Cal.3d 644, P.2d , Cal.Rptr. (1984)	2, 7, 9, 11, 12, 15, 17, 19, 20, 21, 22 24
Fisher v. *City of Berkeley*, 148 Cal.App.3d 267, 195 Cal.Rptr. 836 (1983)	2, 25, 26
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	9, 11
Green v. *Superior Court*, 10 Cal.3d 616, 111 Cal.Rptr. 704, 517 P.2d 1168 (1974)	23
Heart of Atlanta Motel v. *United States*, 379, U.S. 241 (1964)	9
Hicks v. *Miranda*, 422 U.S. 332 (1975)	8
Hines v. *Davidowitz*, 312 U.S. 52 (1941)	20
Jenkins v. *Georgia*, 418 U.S. 153 (1974)	6
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977)	20
King Mfg. Co. v. *City Council of Augusta*, 277 U.S. 100 (1928)	3
Knight v. *Hallsthammar*, 29 Cal.3d 46, 171 Cal.Rptr. 707, 623 P.2d 268 (1981)	23
McClain v. *Real Estate Board*, 444 U.S. 232 (1980)	9
Minnesota v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981)	19

CASES — PAGE(S)

Monsato Co. v. *Spray-Rite Service Corp.*, ___U.S. ___ L.Ed. 2d 775, 104 S.Ct. 1454 (1985) 10, 12
Nat'l Soc'y of Professional Engineers v. *United States*, 384 U.S. 679 (1978) 11, 15
Ocala Star-Banner Co. v. *Damron*, 401 U.S. 295 (1971) 6
O'Hara v. *Western Seven Trees Corp.*, 75 Cal.App.3d 798, 142 Cal.Rptr. 487 (1977) 23
Ohio ex rel. Eaton v. *Price*, 360 U.S. 246 (1959) 8
Orr v. *Orr*, 440 U.S. 268 (1979) 6
Parker v. *Brown*, 317 U.S. 341 (1943) 9, 13, 16, 21
Penn Central Transportation Co. v. *City of New York*, 42 N.Y. 2d 324, 366 N.E.2d 1271 (1977), *aff'd* 438 U.S. 104 (1978) 23, 24
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 19
Raley v. *Ohio*, 360 U.S. 423 (1959) 6
Rice v. *Norman Williams Co.*, 458 U.S. 654 (1982) 14
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) 13
Smith v. *David*, 120 Cal.App.3d 101, 176 Cal.Rptr. 112 (1981) 23
Southern California Gas Co. v. *Public Utilities Commission*, 23 Cal.3d 470, 153 Cal.Rptr. 10, 591 P.2d 34 (1979) 23
Stoiber v. *Honeychuck*, 101 Cal.App.3d 903, 162 Cal.Rptr. 194 (1980) 23
Tully v. *Griffin, Inc.*, 429 U.S. 68 (1976) 8
Uccello v. *Laudenslayer*, 44 Cal.App.3d 504, 118 Cal.Rptr. 741 (1975) 23
United States v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944) 10
United States v. *Container Corp. of America*, 393 U.S. 333 (1969) 15
United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) 10 12
United States v. *Socony-Vaccum Oil Co.*, 310 U.S. 150 (1940) 10, 12, 15
United States v. *Southeastern Underwriters Ass.*, 322 U.S. 533 (1944) 9
United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) 11
Ward v. *Village of Monroeville*, 409 U.S. 57 (1972) 6
Wickard v. *Firburn*, U.S. 111 (1942) 9
Wilson v. *Cook*, 327 U.S. 474 (1946) 6

STATUTES AND BILLS — PAGE(S)

15 U.S.C. § 1 ..... 3, 10
§ 15a 4
§ 15c 4
§ 35 ..... 4, 18
28 U.S.C. § 1257(2) 3
§ 2013 1
CAL GOV'T CODE § 65589 (Deering) 4,15
CAL. HEALTH & SAFETY CODE § 1518 ..... 4, 15
§ 50008 16
§ 50202 ..... 4, 16
§ 51852.5 ..... 4, 16
ME. REV. STAT. tit. 30., ch. 244 21
MASS GEN. LAWS ANN. ch. 797, §§ 1 et seq. and ch. 842, §§ 1-14 21
N.J. STAT. ANN. §§ 2A, 42-74 and 42-77 21
N.Y. UNCONSOL. LAWS §§ 8581 et seq. (McKinney) 21
H.R. 2891, 98th Cong. 2d Sess. (1984) 18
H.R. 3361, 98th Cong. 2d Sess. (1984) 18
H.R. 5573, 98th Cong. 2d. Sess. (1984) 18
H.R. 5992, § 3, 98th Cong. 2d Sess. (1984) 18
S.B. 1578, 98th Cong. 2d Sess. (1984) 18

AUTHORITIES

Tribe, *American Constitutional Law*, §§ 6-2, 6-23 (Foundation Press, 1978) 20

No.

IN THE

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ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,

Appellees.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

Appellants ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN, ANTHONY KERSHAW and LEVIN-ZEMEL, a corporation, submit their jurisdictional statement and respectfully request that probable jurisdiction be noted.[1]

[1]Alternatively, appellants request that the jurisdictional statement be treated as a petition for writ of certiorari, and granted. 28 U.S.C. § 2103.

OPINIONS BELOW

The opinion of the California Supreme Court is cited as *Alexandra Fisher* v. *City of Berkeley*, 37 Cal.3d 644, P.2d , Cal.Rptr. (1984). The opinion appears as Appendix A.

The opinion of the California Court of Appeal was cited (until vacated) as *Alexandra Fisher* v. *City of Berkeley*, 148 Cal.App.3d 267, 195 Cal.Rptr. 836 (1983). The opinion appears as Appendix B.

JURISDICTIONAL BASIS

(i) Appellants filed suit for declaratory and injunctive relief in the Superior Court in and for the County of Alameda, State of California. The complaint sought a declaratory judgment that the Berkeley Rent Stabilization And Eviction For Good Cause Ordinance, Berkeley, California Ordinance 5261-N.S. (June 3, 1980) (the "Ordinance")[2] violated the Federal Constitution and an injunction against its enforcement. The superior court initially issued a temporary restraining order and then a preliminary injunction against enforcement of portions of the Ordinance. Shortly thereafter another judge of the superior court vacated the preliminary injunction and granted appellees' motion for judgment on the pleadings, declaring that the Ordinance was valid in all respects and ordering appellants to obey its mandates.[3] The California Court of Appeal, First Appellate District, Division Five, unanimously reversed the superior court and declared that the Ordinance was unconstitutional. After granting hearing, the California Supreme Court, in a 6 to 1 decision, reversed the court of appeal and sustained the validity of the Ordinance against appellants' constitutional attack.[4]

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[2] The Ordinance appears as Appendix G. Unless otherwise indicated, all references to "sections" are to sections of the Ordinance.

[3] The temporary restraining order, preliminary injunction and judgment on the pleadings appear as Appendices C, D and E, respectively.

[4] Two regular supreme court justices did not participate in the decision and were replaced by Los Angeles Superior Court judges who were assigned by the Chief Justice; the *pro tem* justices voted with the majority.

(ii) The judgment of the California Supreme Court was rendered on December 27, 1984. Appellants filed their notice of appeal in the California Supreme Court on March 18, 1985.[5]

(iii) This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2), which provides for an appeal from a final judgment of a state's highest court "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." Section 1257(2) applies where a municipal ordinance has been declared constitutional by a state's highest court. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 207 n. 3 (1975); *King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100 (1928); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 612 (1971).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant Constitutional provisions are:

Article VI, clause 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fifth amendment, section 1: No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth amendment, section 1: No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant statutory provisions are:

15 U.S.C. § 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

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[5] A copy of the notice of appeal appears as Appendix F.

15 U.S.C. § 35: No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

Cal. Gov't Code § 65589 (Deering). Construction: (b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

(c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing elements of the local general plan.

Cal. Health & Safety Code § 1518 (Deering). Rent Controls: (a) Nothing in this chapter shall authorize the imposition of rent regulations or controls for licensed community care facilities.

(b) Licensed community care facilities shall not be subject to controls on rent imposed by any state or local agency or other local government or entity.

Cal. Health & Safety Code § 51852.5 (Deering). Exemptions for Rental Housing Developments: Notwithstanding any other provision of law:

(a) Any rental housing development which is financed from mortgages insured pursuant to this chapter shall be exempt from all of the following: . . .

(2) Any rent control except for units made available to lower income households as provided pursuant to subdivision (a) of Section 51226 and subdivision (k) of Section 51852.

Cal. Health & Safety Code § 50202 (Deering). Authority to Impose Rent Regulations or Controls: Nothing in this division shall authorize the imposition of rent regulations or

controls except by a regulatory contract between the agency or the department, as the case may be, and its housing sponsor or developer, for housing units financed, insured, coinsured or otherwise assisted by the agency or by the department, as the case may be. Except for the federal government, the right to control rent on such units shall reside exclusively in the agency or the department, as the case may be, and the housing sponsor or developer so regulated shall not otherwise be subject to controls on rent imposed by any state or local agency or other local public entity.

STATEMENT OF THE CASE

Appellants contend that the Ordinance is unconstitutional on its face pursuant to the supremacy clause and, specifically, is preempted by the Sherman Act. Appellants further contend that the Ordinance deprives them of their property without just compensation.

Appellants are owners and operators of residential rental properties within the City of Berkeley, California. On June 3, 1980, the Berkeley electorate enacted the Ordinance, which froze all rents as of May 31, 1980 at levels that already had been strictly controlled for the preceding two years.[6] Rents are allowed to rise above their frozen level only in two ways: a) the annual general adjustment, if any; and b) individual adjustments pursuant to an individual petition and administrative hearing process. Appellee Rent Stabilization Board ("the Board") presides over these processes and administers and enforces the Ordinance.

Section 11, which governs annual general adjustments, permits (but does not require) the Board to grant annual city-wide rent increases to offset certain cost increases (i.e., utility

[6] Measure I, the Renter Property Tax Relief Ordinance enacted by the Berkeley electorate on November 7, 1978 froze rents at their June 1978 levels and required landowners to pass on to their tenants 80% of their "Proposition 13" property tax savings by reducing the rents for calendar year 1979. On November 27, 1979, the Berkeley City Council passed Ordinance 5212 which froze rents at their reduced 1979 levels and permitted only a 5% increase for actual and fully documented cost increases. Section 10; Appendix G at A-122.

rates, property taxes) but prohibits general increases for any other reason. Thus the general adjustment mechanism ensures that a landowner's rental income will never be greater than it was on May 31, 1980. The Board is prohibited from granting an annual general adjustment to offset the erosionary impact of inflation on May 31, 1980 rental dollars.

Section 12, which governs the individual petition process, allows an adjustment of the 1980 rental ceiling only when, in a formal administrative hearing, the landowner demonstrates that an increase is necessary to provide "a fair return on investment." Section 12(c); Appendix G at A-129.

Thus, rents are perpetually frozen at their May, 1980 level except for: a) a very limited, discretionary annual adjustment to reimburse landowners for certain operating cost increases and b) individual adjustments but only to the extent proven necessary to provide a return on investment. Even adjustments for inflation, if permitted at all, must be achieved by each landowner separately through the individual petition process. There are more than 23,000 rental units in Berkeley.

The questions presented by this appeal were expressly decided by the California Supreme Court below in a 117 page slip opinion and are properly before this Court.[7] Appellants raised their due process claim at each stage in the proceedings below, in the superior court, in the California Court of Appeal

[7] The general rule is that on review of a state court decision, the federal question presented should be decided below in the state court in order to confer jurisdiction upon this Court. *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969); *Wilson* v. *Cook*, 327 U.S. 474, 480 (1946). "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959). See also, *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 299 n. 3 (1971); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61 (1972); *Orr* v. *Orr*, 440 U.S. 268, 274-275 (1979).

Jurisdiction also resides in this Court where the federal question is raised below but the state court failed to decide it, *Chambers* v. *Mississippi*, 410 U.S. 284, 290 n. 3 (1973), and where the state court decided the federal question, even though it was not raised by the parties below. "But whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice." *Jenkins* v. *Georgia*, 418 U.S. 152, 157 (1974).

and in the California Supreme Court. The supremacy clause preemption issue was raised initially in the state supreme court with that court's express permission. In January, 1984, the court below granted applications of appellants and amicus curiae California Apartment Association to file briefs arguing the applicability of this Court's decision in *Community Communications Co. v. City of Boulder*, 445 U.S. 40 (1982) (hereinafter "Boulder") which was decided after filing of the reply brief in the Court of Appeal.[8] The preemption issue was the focal point of the first 54 pages of the slip opinion below. Appendix A at A-1 through A-35.

I.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

A. The Ordinance Impermissibly Conflicts With And Is Preempted By The Sherman Act.

The preemption issue raised in this appeal is of crucial significance in determining the powers of local governments nationwide, acting independently of their respective sovereign states to enact ordinances which directly interfere with federal policies favoring price competition. Departing substantially from this Court's teachings, the opinion below authorizes municipalities to contravene the Sherman Act's economic policies virtually at will, so long as the municipality seeks to serve the "public welfare."[9] If municipalities are to be given such authority—not only with respect to fixing rental rates, but,

[8] After granting the parties and amici permission to file briefs on the preemption issue, the court below wrote to counsel asking for further briefing on an extensive list of detailed questions concerning the issue. More than a dozen briefs were filed below on the subject. The state court held the issue was properly presented and ruled upon it. 37 Cal.3d at 654 n. 3; Appendix A at A-5 n. 3.

[9] The majority below acknowledged that their decision was unprecedented: "We recognize at the onset that this case forces us to wander off the map and travel cross-country without the benefit of trail or compass." 37 Cal.3d 663; Appendix A at A-15. Such acknowledged uncertainty resulted in a confused opinion below that erroneously applies antitrust and commerce clause law.

under the holding below, extending to other services and commodities deemed by those local governmental entities to be important to the public welfare—then it is for this Court (not the California Supreme Court) to so decide.[10]

B. The Ordinance Denies Landowners Any Return On The Value Of Their Property.

The Ordinance, affirmed by the decision below, establishes an erroneous constitutional standard which authorizes local governments to limit rents so that landowners will receive only a limited return on their original investment without regard to the value of their already-developed property as it has appreciated over years of ownership. The recent advent of stringent rent control laws in California, enacted by self-interested tenant electoral majorities, makes this issue ripe for resolution as it substantially affects the rights of owners of more than 23,000 rental units in Berkeley as well as many thousands of property owners in more than 50 California cities subject to local rent control (there are more than 450 cities and counties in California).

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[10] This Court should grant plenary consideration and provide its own well-reasoned opinion to afford clear guidance on this important issue. Otherwise, lower courts would be required to consider a summary disposition as binding precedent of this Court. *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975). " '[V]otes to affirm summarily, and to dismiss for want of substantial federal question . . . are votes on the merits of a case.' " *Id.* at 344, quoting from *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959).

II.

THE RULING OF THE CALIFORNIA SUPREME COURT FAILS TO RECOGNIZE THAT THE BERKELEY RENT-FIXING SCHEME IS IN DIRECT CONFLICT WITH AND PREEMPTED BY SECTION 1 OF THE SHERMAN ACT.

The court below upheld a pervasive municipal ordinance which directly fixes and stabilizes the rental prices of virtually all residential property in the City of Berkeley.[11] That ruling raises significant and critical federal issues because it departs substantially from numerous, long-standing and unequivocal precedents of this Court and creates an entirely new and erroneous rule of federal law. In particular, the California Supreme Court:

(a) created a local "public welfare" immunity for municipalitites from the antitrust laws;

(b) refused to adhere to the specific standards carefully developed by this Court for determining the circumstances under which governmentally mandated anticompetitive conduct is exempted from the coverage of federal antitrust laws. *Parker v. Brown*, 317 U.S. 341 (1943) (hereinafter "*Parker*"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (hereinafter "*Lafayette*"); *Boulder*.

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[11] While the court below declined to address the issue, it is without question that the rental housing industry with its intertwined relationship with the interstate finance, construction and materials industries and the interstate movement of people and business, possesses the minimal nexus to interstate commerce to confer Sherman Act jurisdiction. *Fisher*, 37 Cal.3d at 662, Appendix A at A-14. The Sherman Act is the broadest of commerce clause enactments. *United States v. Southeastern Underwriters Associates*, 322 U.S. 533, 553 (1944); *Midcal*, 445 U.S. at 110-111. All that is required is a "not insubstantial effect" on an industry affecting commerce. *McClain v. Real Estate Board*, 444 U.S. 232, 246 (1980). It takes very little actual effect to meet the "affecting commerce" standard. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). Clearly rent control of 23,000 units has dramatic substantial effects on finance, construction and related interstate industries. See, Bay Area Council Rental Housing in California: Obstacles and Opportunities April 1983 (Appendix H); see *Fisher*, 37 Cal.3d at 716 (Lucas, J., dissenting); Appendix A at A-83-84.

(c) refused to recognize that governmentally imposed vertical price control, not otherwise exempt as sovereign state action, is preempted by the Sherman Act, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (hereinafter "*Midcal*");

(d) refused to follow this Court's consistent analysis of horizontal and vertical price-fixing as constituting per se violations of Section 1 of the Sherman Act. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); and *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464 (1984)]; and

(e) erroneously applied a commerce clause "balancing test" to uphold a local price fixing law which is preempted by the Sherman Act.

A. The Ruling Below Ignores This Court's Precedents Which Unequivocally Establish That Governmentally Imposed Price-Fixing, Not Exempt As "State Action," Is Preempted By Federal Antitrust Statutes.

Section 1 of the Sherman Act, by its terms, is directed at "every contract, combination . . . or conspiracy in restraint of trade or commerce . . . ." This Court has consistently ruled that any agreement or combination which has the purpose and effect of "raising, depressing, fixing, pegging or stabilizing . . ." prices is illegal *per se* under Section 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). The Sherman Act embodies extremely important national economic policies. In *Midcal*, 445 U.S. at 110-11, it was stated:

> The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.
>
> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 31 L.Ed.2d 515, 92 S.Ct. 1126, 1135, (1972). . . .

The most critical aspect of our national antitrust policy is price competition. As this Court recognized in *Nat'l Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978):

> Price is the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 N. 59, and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

See also Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) and *Arizona v. Maricopa County Med. Soc'y.*, 457 U.S. 332 (1982).

The California Supreme Court failed to accept this Court's long-standing teaching that price-fixing is inherently harmful to competition and that once price-fixing is established there need be no further inquiry into or evidence supporting the anticompetitive impact of the practice involved.[12] As this Court

[12] Even if an inquiry were made, it is clear that the Ordinance has significant anticompetitive impacts. Justice Lucas in his dissent, below, clearly articulated the anticompetitive effects of the Ordinance. 37 Cal.3d at 716; Appendix A at A-84:

> [R]ent control measures bring about the very evils that have prompted the United States Supreme Court's condemnation of private maximum-price arrangements. Rent control laws cripple the economic freedom of landlords and thereby restrain their ability to sell housing in accordance with their own best judgment exercised in light of market conditions. (See *Kiefer-Stewart*, supra, 340 U.S. at p. 312.) Moreover, maximum rents may be fixed too low to encourage, or even permit, landlords to furnish services or facilities deemed necessary or desirable by their tenants. (See *Albrecht*, supra, 390 U.S. at pp. 152-153) Where is the competitive incentive under a rent control scheme?
>
> As previously indicated, just as maximum pricing of goods and services generally discourages entry into the market. (See *Maricopa*, supra, 457 U.S. at p. 348), maximum rents have a negative impact on the production of new housing (Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws* (1984) 69 Cornell L.Rev. 604, 609-610; Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, supra, 32 Emory L.J. 721, 723) . . . .

ruled in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 218:

> Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

This is true not only as to horizontal price-fixing among competitors, but to vertical price restrictions as well. *United States v. Parke, Davis & Co.*, 362 U.S. 29; *Albrecht v. Herald Co.*, 390 U.S. 145; *Monsanto Co. v. Spray-Rite Service Corp.*, ____U.S.____, 104 S.Ct 1464. The Berkeley Ordinance vertically mandates that landowners stabilize the prices at which they rent their property and this, in turn, precludes horizontal price competition with respect to the 23,000 rental unit market. Section 10, Appendix G at A-122. The inevitable result is that, horizontally, price competition among landowners in Berkeley is unlawfully eliminated. *See, e.g., Midcal,* 445 U.S. at 103; *Albrecht v. Herald Co.*, 390 U.S. 145 and *United States v. Parke, Davis & Co.*, 362 U.S. 29. The inability to adjust price also prevents adjustment of "non-price' features of a product, service or commodity. In housing, for example, price-fixing virtually eliminates esthetic improvements, security services and other 'quality' features through which landowners could compete. Thus, the market and consumers are denied any diversity and innovation. A low price is, after all, not the sole objective either of consumers or of Congress, and elimination of price competition in pursuit of that single factor is beyond the constitutional capacity of the City of Berkeley. *Lafayette,* 435 U.S. at 408; *Boulder,* 455 U.S. at 50-51.

The opinion below, however, disregards decades of precedent by this Court, criticizes as "arbitrary" and "mechanical" the characterization of price fixing as illegal *per se* and concludes that the per se rule of illegality does not apply to a municipal defendant's price-fixing ordinance. 37 Cal.3d at 651;

Appendix A at A-1.[13] The California court thus summarily rejected the carefully evolved wisdom of this Court's rulings in *Midcal; Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Lafayette* and *Boulder.*

In addressing whether state laws are preempted by the Sherman Act, this Court has consistently recognized the anticompetitive impact of governmentally imposed price-fixing. It has firmly held that such mandated price fixing is in conflict with Section 1 of the Sherman Act unless immunized by the "state action" exemption of *Parker,* 317 U.S. 341. Thus, in *Schwegmann,* 341 U.S. at 389, this Court stated: "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids . . . ."

More recently in *Midcal,* this Court considered whether the Sherman Act preempted California's resale price maintenance and price posting statutes applicable to the sale of wine. It ruled that a governmentally imposed vertical price-fixing scheme is subject to the illegal *per se* analysis under the Sherman Act unless such price-fixing is accomplished pursuant to a clearly articulated and affirmatively expressed state policy and is actively supervised by the state itself. 445 U.S. at 105 citing *Lafayette,* 435 U.S. at 410. In *Midcal,* even though there was a clearly articulated and affirmatively expressed state statutory policy favoring vertical resale price maintenance, this Court nevertheless held the state program to be preempted under a *per se* illegality analysis of the Sherman Act, because the state did not actively supervise the program. 445 U.S. at 105-106. California has no clearly articulated or affirmatively expressed state policy favoring rent control nor active state supervision of this or any other municipal rent control program in California.

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[13] The California Supreme Court cited *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979) as supporting this premise. 37 Cal.3d at 66-67; Appendix A at A-20. However, *Broadcast Music* is wholly lacking in relevance to and is fundamentally different from the instant case. There, this Court observed that "blanket licensing" agreements protecting copyrighted music were proper in light of previous stipulated consent decrees. *Id.* at 11-12 and 20. Of even greater significance was the fact that Congress, in the Copyright Act of 1976 [17 U.S.C. §§ 111(d) (5), 116 (c)(4) and 118(b)], authorized the use of blanket licensing practices as a means of preventing unauthorized use of copyrighted material. *Broadcast Music,* 441 U.S. at 15, 20. There is no similar Congressional approval of local rent controls or price fixing.

The Ordinance is purely and simply a non-exempt, non-immune price fixing scheme which is in direct conflict with, and unlawful *per se* under Section 1 of the Sherman Act. In *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982), this Court observed that a "*state statute* is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect." (Emphasis added.) However, the Court went on to recognize that in cases such as *Midcal* (and the case at bench), a governmentally imposed vertical price maintenance program *does* facially conflict with the Sherman Act because such price maintenance is "an activity that has long been regarded as a *per se* violation of the Sherman Act." 458 U.S. at 659-660. And, as *Lafayette* and *Boulder* make clear, the circumstances under which *local* action may be preempted are considerably broader than in the case of *state* programs such as were examined in *Midcal* and *Rice*.

The state court below disregarded *Schwegmann, Midcal* and *Rice* in refusing to apply a *per se* illegality analysis to the municipal rent-fixing ordinance and in refusing to find that control of price competition was facially inconsistent with and preempted by the Sherman Act.

The rule propounded below distorts beyond recognition both the substantive law of antitrust and the constitutional law of preemption, by expanding this Court's caveat in *Lafayette* until it swallows up the holding of the case. In footnote 48, this Court in *Lafayette* stated: "It may be that certain activities which might appear anti-competitive when engaged in by private parties take on a different complexion when adopted by the local government." *Lafayette*, 435 U.S. at 417 n. 48. Appellants construe this dictum as a caution against making assumptions about municipal activity before first examining that which appears anticompetitive to confirm whether it is anticompetitive; that is, to determine whether in fact the same or similar anticompetitive effects exist as would be caused by similar private conduct. In price-fixing cases such as the instant one, the result is the same irrespective of the actor: the interference with the setting of price by free market forces. *See*

United States v. Container Corp., 393 U.S. at 337; *National Society of Professional Engineers* v. *United States*, 435 U.S. at 679; *United States v. Socony-Vacuum Oil Company*, 310 U.S. at 226 n. 9. The court below, however construed that footnote as authority for a blanket exemption for municipal action, a proposition rejected by this Court in *Lafayette* and *Boulder*.

B. The Ruling Below Ignores The Carefully Developed Standards Established By This Court In Determining Whether Municipal Action Violates Federal Antitrust Statutes.

The Berkeley Ordinance fixes the price at which virtually all privately-owned residential rental property (more than 23,000 units) may be rented or leased.[14] The California Supreme Court recognized that the Ordinance fixed prices and also that rent control is not carried out pursuant to any clearly articulated or affirmatively expressed policy of the state, acting as sovereign; nor does the state in any way supervise local rent control programs. "California has no state rent control statute." 37 Cal.3d at 655; Appendix A at A-6. To the extent it deals with the subject at all, the statutory structure of the State of California is expressly neutral with regard to rent control[15] Nevertheless, the Court below ruled that the City of Berkeley could require all private landowners to fix the rates for the rental of residential property.

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[14] Interestingly, the Ordinance exempts residential units owned by the city from rent control. Section 5; Appendix G at A-113. The court below failed to discuss this predatory activity by the city as a market participant in the context of the "even handed" element of its own new test.

[15] As Justice Lucas' dissent noted: "It is uncontradicted that the California Legislature has not directly spoken on the subject of rent control, much less "clearly articulated and affirmatively expressed" any policy favoring local ordinances such as Berkeley's." 37 Cal.3d at 714; Appendix A at A-82. The four statutes which appellees asserted below as the basis of *Parker* immunity are set forth herein in "Relevant Constitutional And Statutory Provisions Involved." As a cursory reading demonstrates, each of those statutes is either a declaration of *neutrality* as to rent control or a preemptive *prohibition* thereof in a specific context. Government Code section 65589 not only declares at subdivision (b) that nothing in that article constitutes *authorization* for rent controls; it also disclaims in subdivision (c) that it similarly does not grant additional authority for "measures that may be taken ... to implement" the state housing policy embodied in that article. Health and Safety Code section 1518 prohibits rent controls on licensed community care

(Footnotes continued on following page)

Contrary to the standards established by this Court, the California Supreme Court has created a blanket exemption from antitrust requirements for municipal governmental action. Over a period of forty years, this Court has carefully articulated very specific standards for determining when and under what circumstances state and local governmental units may violate the pro-competition mandates of the Sherman Act and other federal antitrust statutes. *Parker,* 317 U.S. 341, *Midcal,* 445 U.S. 97, *Lafayette,* 435 U.S. 389, *Boulder,* 455 U.S. 40. These decisions make clear that local governmental units (such as appellee City of Berkeley), acting alone, are powerless to suspend, change or modify the federal policy commitment to free and open competition, particularly price competition.

If the achievement of some essential or important social or public interest requires suspension of competitive practices then the decision to replace competition with regulation may be made by the state as sovereign. *Parker,* 317 U.S. at 350-351. However, this Court has emphatically refused to permit cities, counties and lesser local governmental units to interfere with the pro-competition mandate of federal antitrust policy to accomplish what is perceived by local government to be a more important local interest. As stated in *Lafayette,* 435 U.S. at 408:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

(Footnotes continued from previous page)

facilities, which appellees theorized was an implied *authorization* of controls in any other context. Such silence cannot be construed as anything more than *neutrality* and certainly not a "clearly articulated and affirmatively expressed" policy favoring rent control. Health and Safety Code sections 50008 and 51852.5 likewise contain no authorization for municipal rent control. While subdivision (a)(2) of section 51852.5 appears to "contemplate" rent controls as to certain low income households, that section is part of a government-supported mortgage program wherein owners of property freely contract to supply a number of low-income units at controlled rents in consideration for low-cost financing. Section 50202 provides the key to 51852.5; it states clearly that (a) it does *not* authorize controls on units not financed under that program, and (b) there are permitted *no* controls on the latter units other than those specified in the regulatory contract freely entered into by the owner in consideration of the financing advantages conferred.

> We conclude that these additional arguments for implying an exclusion for local governments from the antitrust laws must be rejected. (Footnote omitted.)

And as was further recognized in *Lafayette,* 435 U.S. at 412-413, and reaffirmed in *Boulder,* 455 U.S. at 50-51:

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. . . . In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach. (Citation and footnote omitted.)

Yet the state court below maintains exactly the opposite position:

> To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate for the motives that underlie local government regulation . . . , courts must develop tests that recognize a public welfare "defense" to alleged violation of the antitrust laws by municipalities. (Citations omitted.)

37 Cal.3d at 673; Appendix A at A-28.[16]

If a state has made the sovereign decision to suspend policies of competition in order to achieve an alternative purpose, it may choose to implement and effectuate the latter interest through the use of local governmental action. The local government, then, enjoys antitrust immunity only if its ordinance is:

> (a) enacted pursuant to a "clearly articulated and affirmatively expressed" state policy. *Lafayette,* 435 U.S. 410, 413; *Boulder,* 455 U.S. at 51-55, and

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[16] The correct rule was recognized by Justice Lucas' dissent below: "In short, *Boulder* established, cities, like private entities, 'must obey the antitrust laws' (455 U.S. at 57 quoting the *Lafayette* plurality)." 37 Cal.3d at 714; Appendix A at A-82.

(b) enforced under "active state supervision." *Lafayette,* 435 U.S. at 410; *Midcal,* 445 U.S. at 105; *Boulder,* 455 U.S. at 51 n. 14 to ensure that the local enforcement does not over-step the state's contemplated suspension of competition.

Significantly, these standards set forth by this Court have received recent reaffirmation and approval by Congress. Following this Court's decision in *Boulder,* an intense lobbying effort was undertaken in Congress to seek passage of legislation to exempt municipalities from the antitrust laws. While granting cities an exemption from monetary damage claims in antitrust actions, Congress implicitly rejected the "public welfare" theories embraced below and knowingly permitted actions for declaratory and injunctive relief based upon the supremacy clause, as well as this Court's rulings, to proceed unfettered.[17]

Contrary to the consistent rulings of this Court, and the intent of Congress so recently manifested, the opinion below establishes a blanket exemption which allows a municipality to ignore the federal antitrust laws despite the absence of a clearly articulated and affirmatively expressed state policy and without active state supervision of the anticompetitive program.

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[17] Local Government Antitrust Act of 1984, 15 U.S.C. § 35; Public Law 98-544. While space does not permit a detailed discussion here, the legislative history of the Act demonstrates clearly that Congress considered and rejected the municipal antitrust exemption imposed below. H.R. 5992, § 3, 98th Cong., 2d Sess. (1984) would have totally exempted municipal acts "reasonably undertaken to protect or provide for the public health, safety or welfare." Similarly, H.R. 5573, 98th Cong., 2d Sess. (1984) would have totally exempted "the exercise of its [a municipality's] regulatory power" but not its proprietary activities. S.B. 1578, 98th Cong. 2d Sess. (1984) would have exempted from damage liability "regulatory" activity taken "to protect the public health, safety or welfare" but not proprietary activity. H.R. 3361, 98th Cong., 2d Sess. (1984) would have exempted from damage liability conduct "within the authority vested in the unit of local government under the law of the state" and H.R. 2981, 98th Cong., 2d Sess. (1984) would have provided that municipal conduct "within the authority vested in such unit by any law" could only incur liability if a state so authorized could be liable. Ample committee history demonstrates that both House and Senate simply focused on damage remedies while leaving the vitality of this Court's *Boulder* and *Lafayette* decisions wholly intact as to the type of injunctive and declaratory relief sought in this case.

C. The California Supreme Court Developed Its Own Unprecedented Test For Determining The Validity Of Municipal Anticompetitive Action.

The state court below did not simply disregard the well-established and plainly applicable antitrust and preemption principles articulated by this Court. In perhaps its most extreme departure from precedent, the state court established a "public welfare" defense to immunize municipally imposed price maintenance schemes from the Sherman Act, even though the state, as sovereign, has been expressly neutral regarding local rent control, thereby openly flaunting this Court's rulings in *Lafayette* and *Boulder.*

The state court took it upon itself to create a new judicial rule for determining whether municipal price-fixing activity is preempted under the Sherman Act. Its test is stated thusly:

> Adapting the [United States Supreme] [C]ourt's commerce clause test to this facial section I attack on a municipal rent control ordinance, we conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. (Footnotes omitted.)

37 Cal.3d 675; Appendix A at A-31.

This "test" is borrowed, in part, from the traditional approach used by this Court to determine if a state or local enactment constitutes an undue burden on interstate commerce in cases where Congress has been silent respecting the subject matter of the regulation. *See, e.g., Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970) and *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981). It is a test used to inquire whether Congress, by its silence, intended to permit local regulation or to adopt a uniform policy of nonregulation of the subject matter

involved. Clearly, this approach has absolutely no applicability where, as here, the Sherman Act directly prohibits price maintenance programs or schemes.

But the ruling below did not just apply the wrong test, it also modified the test to make it virtually inevitable that in every case local interests will override federal antitrust policy:

> We will, however, depart from the United States Supreme Court's commerce clause test in one significant respect. We will not apply the wide-ranging, essentially standardless cost-benefit analysis employed in the court's recent "balancing" decisions.

37 Cal.3d at 675; Appendix A at A-30.

Thus, an anticompetitive municipal ordinance will stand unless a plaintiff can carry the burden of showing that the local interest can be achieved as effectively by a means that would have a less intrusive impact on competition. In short, the California court's test permits municipalities to violate federal statutory antitrust policy if that is reasonably necessary to achieve some real or imagined local interest.

The *Midcal* case makes it clear that there is no room for balancing local interests, regardless of their importance, against the strong congressional mandate prohibiting interference with price competition. Plainly, the so-called "negative implication of the Commerce Clause" test used by the state court has no place in determining whether a local ordinance is in conflict with express federal statutory language or policy. *Hines v. Davidowitz,* 312 U.S. 51 (1941); *Nash v. Florida Industrial Comm'n.,* 389 U.S. 235 (1967); *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977); Tribe, *American Constitutional Law,* §§ 6-2, 6-23 (Foundation Press, 1978).

This is not to say that some important local interests which require deviation from unfettered competition are unachievable. Indeed, this Court's prior rulings have provided the necessary "safety valve." If the state legislature, as sovereign, clearly articulates and affirmatively expresses a need to achieve a specific public purpose and chooses to accomplish that interest by limiting the forces of competition, even price

competition, that state policy may be valid. *Parker,* 317 U.S. 341.[18]

If the ruling below is allowed to stand, state and federal courts across the nation will be compelled to apply it as precedent to elevate local interests supporting municipal price fixing ordinances over the strong federal statutory prohibition against interference with price competition. The test will apply not only to ordinances which fix rental rates but also to laws which fix the price of any other service or commodity deemed important to the local public interest.[19]

Cities are not sovereigns and they are powerless to create a crazyquilt of anticompetitive havens which are free from the coverage of federal antitrust policy. If rent control is important or essential to the public interest, advocates of such legislation should direct their pleas and arguments to the state legislature, which in turn can strike the delicate balance between the need for such price maintenance *vis a vis* the importance of price competition. This is not a choice open to local governmental agencies or voters enacting laws through the initiative process, as was done here. For them it is all too easy to dismiss the long range importance and enduring value of competition in favor of urgent and immediate political or pocketbook pressures felt by a large body of tenant voters. The ruling of the California Supreme Court permits these local, parochial interests and pressures to prevail over a national legislative policy which has guided this nation's economic destiny for a century.

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[18] Legislatures in other states have clearly articulated and affirmatively expressed state policies authorizing local governments to enact rent controls. New York; *McKinney's Unconsolidated Laws of New York* (West, 1974) Book 65, §§ 8581 et seq.; Massachusetts: Massachusetts General Laws, Chapters 797, §§ 1 et seq. and 842, §§ 1-14; New Jersey: New Jersey statutes, §§ 2A, 42-74 and 42-77; Maine: Maine Revised Statutes Annotated, Title 30, Chapter 244. Appellants are aware of no municipality imposing rent control outside California without a specific state mandate to do so.

[19] The opinion below states that the "public welfare" exemption would apply not simply to "traditional" or "integral" governmental functions, but also would immunize "all local actions rationally related to the promotion of local health, safety and welfare." 37 Cal.3d at 675 n. 27; Appendix A at A-31 n. 27. Thus the City of Berkeley could fix the price of a myriad of commodities or services within the city limits, despite a negative interstate impact and a lack of state authorization or supervision.

III.

THE ORDINANCE IS CONFISCATORY.

A. Landowners Are Denied Any Return On The Value Of Their Property As Of The Date Rent Control Is Imposed.

The court below erroneously concluded that a landowner is not entitled to establish rents which provide a reasonable return on the value of his property, and that rent levels which only allow a return on historical investment satisfy constitutional requirements. The lower court's decision establishes a standard which permits confiscation of the appreciated value a landowner's property has achieved over years of ownership and operation.

The question as defined by the state court was whether "the Ordinance's investment standard is unconstitutional on its face because it unfairly deprives landowners of full long-term appreciation on the value of their regulated property." 37 Cal.3d at 685; Appendix A at A-44. The state court then answered the question: "[W]e can state with certainty that a rent control ordinance need not provide for a fair return on the value of a landowner's property in order to survive a facial challenge." 37 Cal.3d at 686; Appendix A at A-45. Thus, a long-time landowner with a small cash investment in a property which has appreciated greatly over the years is, according to the court below, not entitled to a return on the value of his property. The Constitution was interpreted to protect one's historical investment only and not a property's appreciated value achieved over years of ownership.

The state court rejected as "fallacy" the argument that the appreciated value of rental housing is entitled to constitutional protection. This conclusion was based upon an erroneous analogy between rent control laws and zoning and land use regulations which may be upheld even if they diminish the value of real property. See e.g., *Agins v. City of Tiburon,* 24 Cal.3d 266, 277, 175 Cal.Rptr. 372, 598 P.2d 25 (1979), *aff'd,* 447 U.S. 255 (1980); *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) and other cases cited by the court. 37 Cal.3d at 686; Appendix A at A-45. However, the attempted analogy is inapposite.

An owner of residential rental property operates an existing, fully developed business enterprise with contractual obligations to tenants and, under California law, substantial legal obligations as well.[20] The value of the landowner's property is based on its existing condition, not a future expectancy. In contrast, the value of undeveloped real property is a mere potentiality or expectancy based upon how the property might be developed in future years. Thus, zoning regulations may within certain limits alter the future development of a particular property and thereby restrict its expected future value. That is, however, a far different issue than the one decided below, where the present value of a landowner's property based on its existing use and condition is confiscated.

The proper constitutional standard to be applied is that landowners are entitled to a reasonable return on the value of their property, at the very least, as of the date it is subjected to price or rent control. This is harmonious with the standard which governs the regulation of public utility rates. The public utility standard provides for a reasonable return on the current value of the property, *Penn Central Transportation Co. v. City of New York,* 42 N.Y. 2d 324, 366 N.E.2d 1271, 1275 (1977), *aff'd,* 438 U.S. 104 (1978), or the value of the property at the time it was devoted to public use. *Southern California Gas Co. v. Public Utilities Commission,* 23 Cal.3d 470, 474, 153 Cal.Rptr. 10, 12, 591 P.2d 34 (1979). In a very real sense,

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[20] A landowner has the responsibility of maintaining the premises in a safe and secure condition. *Green* v. *Superior Court,* 10 Cal.3d 616, 111 Cal.Rptr. 704, 517 P.2d 1168 (1974). See also, *Knight* v. *Hallsthammer,* 29 Cal.3d 46, 171 Cal.Rptr. 707, 623 P.2d 268 (1981) (holding that a warranty of habitability will be implied in every rental agreement and cannot be waived, even if the condition is known to the tenant); *Stoiber* v. *Honeychuck,* 101 Cal.App.3d 903, 162 Cal.Rptr. 194 (1980) (holding that a landowner may be liable not only for property damage suffered by a tenant because of breach of warranty of habitability, but also liable for intentional infliction of emotional distress); *Smith* v. *David,* 120 Cal.App.3d 101, 176 Cal.Rptr. 112 (1981) (holding that breach of warranty of habitability may be a basis for the imposition of punitive damages); *O'Hara* v. *Western Seven Trees Corp.,* 75 Cal.App.3d 798, 142 Cal.Rptr. 487 (1977) (holding that a landowner may be liable for both compensatory and punitive damages for rape that occurred in tenant's apartment); *Uccello* v. *Laudenslayer,* 44 Cal.App.3d 504, 118 Cal.Rptr. 741 (1975) (holding that landowner may be liable for personal injuries sustained when tenant's dog bit tenant's invitee).

rental units which are subjected to rent control are committed to a public use, to create an adequate low and moderate income housing supply which the municipality desires but does not wish to pay for itself. Sections 2 and 3; Appendix G at 109-111.

The court below criticized and rejected the fair market value standard on the theory that it is circular; that is, that the value of rental property is determined by rents and thus, setting rents based upon value creates a never-ending upward spiral. 37 Cal.3d at 680 n. 33; Appendix A at 38 n. 33. However, this "problem" is illusory. Circularity is avoided altogether by allowing a fair return on the value of property at the time it was subjected to rent control. Such a value would be easy to determine and, since future rents would not affect that valuation, there would be no circularity. Moreover, a standard that recognizes future changes in value is quite workable. As stated in an analogous context in *Penn Central Transportation Co. v. City of New York*, 366 N.E.2d at 1275:

> Reasonable return, however, is an elusive concept, incapable of easy definition. For the reasonableness of the return must be based on the value of the property, and the value of the property necessarily depends on the return permitted or available. The inevitable circularity of reasoning is obvious . . . (citation omitted). In most landmark cases, however, it is acceptable to use alternative bases of valuation, assessed valuation perhaps, as a basis for determining the reasonableness of return.

Other alternative methods for determining value include replacement cost, comparable sales from outside the rent control jurisdiction, or any other generally accepted method not involving capitalization of controlled rental income. It is clear that "circularity" is not an impediment to a fair market value standard, contrary to the rationale of the court below.

Due process requires at a minimum that landowners be allowed to charge rents which provide a reasonable return on the fair market value of their property at the time it was devoted to public use, in this case, the date on which rents were first frozen. This standard would eliminate "circularity" and at the same time protect the value of a landowner's property as it has appreciated over the years prior to the enactment of rent control.

B. The Ordinance Freezes Rents And Subjects Landowners To Confiscation Caused By Inflation.

The Ordinance freezes rents as of May 31, 1980. General adjustments thereafter are permitted in the Board's discretion to offset actual, increased operating costs but are not allowed to compensate landowners for the effects of inflation. Thus, landowners are limited to the same rental dollars and profit dollars in subsequent years that they received in 1980.[21] The Ordinance requires a landowner to resort to the costly and time-consuming individual petition process in order to have any chance to recoup that portion of his 1980 profit dollars which have been eroded by inflation.[22] The court of appeal below struck down the Ordinance for this very reason:

> The purpose of rent control must be to assure fair treatment of both tenants and landlords. In our free enterprise system, the landlord should not be responsible for subsidizing rents to the extent that expenses cannot be recovered and a fair and reasonable profit cannot be received. Although [the Ordinance] would permit harm caused by inflation to be addressed by individual petitions to the Board, . . . delays in considering and acting upon individual petitions would inevitably cause delays in providing a fair return to the landlord and would therefore be confiscatory.

148 Cal.App.3d at 277; Appendix B at A-97 to A-98.

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[21] The "annual adjustment" is limited to rent increases which correspond with a limited number of actual cost increases; however, that is the maximum which may be allowed and even that is in the Board's discretion. Section 11; Appendix G at A-123.

[22] The serious effect of inflation is demonstrated by a simple example. Assuming a landowner's monthly profit on May 31, 1980 was $100, inflation had reduced its value in real terms to $56.80 by the end of 1983. This is compensable, if at all, only via the Ordinance's individual petition process. Using 1979 as a "base year," the inflation rate increased 43.2% by December, 1983 in the San Francisco-Oakland area. Using a 1977 base year, which corresponds to the initial rent fixing law, the inflation rate was 70%. CPI-All Urban Consumers, Consumer Price Index, Selected Metropolitan Areas, U.S. Department of Labor, Bureau of Labor Statistics.

The court of appeal recognized the grave confiscatory effects of a law which freezes rents and requires thousands of landowners to engage in separate administrative hearings in order to obtain rent increases to offset the inevitable effect of inflation. Relying on precedent of this Court as well as *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001, the court of appeal held that where rent ceilings of indefinite duration are imposed,

> an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for . . . situations in which the base rent cannot reasonably be deemed to reflect general market conditions. The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary. "Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them. . . ." *Smith* v. *Illinois Bell Tel. Co.,* 270 U.S. 587, 591, 70 L.Ed. 747, 749, 46 S.Ct. 408 (1926).

Id. at 169 quoted in *Fisher* v. *City of Berkeley,* 148 Cal.App.3d at 277; Appendix B at A-96.

Berkeley has over 23,000 rental units. The filing of a separate petition for each building owned by a landowner, requesting an increase for the effects of inflation on the landowner's 1980 rent or profit level, would create an administrative morass involving a thousand or more evidentiary hearings which would inevitably lead to delay and confiscation.[23]

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[23] The annual filing fees alone for such petition would exceed $1.5 million. Regulation 1203 of the Rent Stabilization Board.

CONCLUSION

For the foregoing reasons, it is requested that probable jurisdiction be noted.

DATED: March 27, 1985

Respectfully submitted,

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84 - 1538

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FILED
MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, an individual;
MARGUERITE JACOBS, an individual;
MORT BAKER, an individual;
RICHARD LAWHORN, an individual;
ANTHONY KERSHAW, an individual;
and LEVIN-ZEMEL, INC., a corporation,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation;
THE BERKELEY CITY COUNCIL; THE BERKELEY RENT
STABILIZATION BOARD; DOES I through XX, inclusive,

Appellees.

On Appeal from the Supreme Court of the State of California

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Table of Contents

		Page
Appendix A	Opinion of the California Supreme Court	
	—Majority Opinion	A-1
	—Concurring Opinion	A-75
	—Dissenting Opinion	A-81
Appendix B	Opinion of the California Court of Appeal	A-88
Appendix C	Temporary Restraining Order of Superior Court, Alameda County, CA	A-101
Appendix D	Preliminary Injunction Order of Superior Court, Alameda County, CA	A-103
Appendix E	Judgment on the Pleadings of Superior Court, Alameda County, CA	A-105
Appendix F	Notice of Appeal	A-107
Appendix G	Tenants Rights Amendments Act of 1982 ("The Ordinance")	A-109
Appendix H	Rental Housing In California: Obstacles and Opportunities. Bay Area Council, April, 1983	A-140

APPENDIX A

IN THE

Supreme Court of California

S.F. No. 24675
Super. Ct. No. 536602-6

ALEXANDRA FISHER et al.,
Plaintiffs and Appellants,

vs.

CITY OF BERKELEY, et al.
Defendants and Respondents.

[Filed December 27, 1984]

OPINION

Plaintiffs, a group of landlords who own property in the City of Berkeley, appeal from a judgment of the Alameda County Superior Court holding defendants' rent control ordinance constitutional on its face. We substantially affirm the judgment.

Plaintiffs claim that defendants' ordinance conflicts with, and hence is preempted by, federal antitrust law because it is a combination that unreasonably restrains interstate commerce in violation of section 1 of the Sherman Antitrust Act (Act or Sherman Act). (15 U.S.C.) They also claim that it constitutes monopolization, or attempted monopolization, in violation of section 2 of the Act. (Ibid.) Although price fixing by private business e[illegible]rprises is clearly illegal per se, we hold that the per se rule of illegality does not apply to the municipal defendants'

price-fixing ordinance in this case. Nor can such a municipal regulation be reviewed pursuant to the traditional rule of reason, under which validity would be judged solely by the regulation's effect on competition. Instead, we have determined that when the validity of an ordinance is challenged under the federal antitrust laws, courts must adapt traditional antitrust rules in order to accommodate municipal governments' legitimate interest in enacting economic and social regulations concerning local health, safety and welfare. We conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 or 2 of the Sherman Act unless the plaintiff demonstrates that the city's purpose could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. No such means have been proposed. Under the foregoing test the ordinance in question has not been shown to conflict with federal antitrust laws.

We also conclude that defendants' ordinance is facially constitutional under both the federal and state due process clauses: a rent control ordinance is valid if it guarantees each landlord a fair return on his investment; it need not guarantee a fair return on the value of property. Furthermore, the ordinance on its face provides for reasonably prompt access to adjustment procedures for those landlords seeking to increase rents. Additionally, we conclude that the rent withholding provisions of the ordinance do not violate landlords' due process rights, nor are such provisions preempted by general state law. Finally, however, we have determined that the ordinance is invalid to the extent it purports to create an evidentiary presumption affecting the burden of proof in regard to retaliatory evictions, but that such a provision is severable, and does not affect the validity of the remainder of the ordinance.

BACKGROUND AND PROCEDURE

In June 1980 the Berkeley electorate enacted initiative "Measure D," the "Rent Stabilization and Eviction for Good Cause Ordinance," (hereafter ordinance). The ordinance affects approximately 23,000 rental units.

Section 3 sets out the purpose of the ordinance: It is intended "to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of this City with regard to low and fixed income persons, minorities, students, handicapped, and the aged."

Section 5 exempts from the ordinance government-owned units, transient units, cooperatives, hospitals, certain small owner-occupied buildings, and all newly constructed buildings. Section 6 establishes a rent stabilization board (Board) of nine commissioners, and sets out its powers, duties, rules and procedures, as well as a means of ending rent control if the city's vacancy rate surpasses 5 percent. Section 8 requires landlords to register with the Board, furnish specified information, and pay a registration fee for each unit.

Section 10 establishes base rent ceilings[1] that landlords may not exceed except as permitted by the Board under sections 11 and 12. Section 11 provides for annual general adjustment of rent ceilings to cover increases or decreases relating to utilities and taxes. In making such general adjustment, the Board is given authority to adopt a general formula based on available data relating to such expenses. If a landlord is not satisfied with this general increase, he may petition the

[1] The base rent ceiling is the rent as of May 31, 1980. Regarding rental units for which there was no periodic rent in effect on that date, or during the six months preceding that date, the base rent ceiling is a "good faith estimate" of the median rent in effect for comparable units in the City of Berkeley on May 31, 1980.

Board for an individual adjustment under section 12. In ruling on this petition the Board must consider many nonexclusive factors, including a landlord's individual costs, but in no event may it deny a rent increase needed to allow a landlord a "fair return on investment."

Section 13 prohibits evictions except for enumerated factors constituting "good cause." Section 14 prohibits retaliatory evictions, and states that any eviction action taken against a tenant within six months of the tenant's assertion of rights under the ordinance shall be "presumed" to be retaliatory.

Section 15 sets out remedies, including rent withholding, both for a landlord's violation of rent ceilings and failure to register. Section 16 is a severability clause. Section 17 declares that the provisions of the ordinance may not be waived. Section 18 provides for judicial review of any act of the Board.

Plaintiffs filed suit in August 1980 seeking injunctive and declaratory relief against enforcement of the ordinance. They alleged the ordinance is unconstitutional on its face and as applied. The trial court granted defendants' motion for judgment on the pleading, declaring the ordinance constitutional on its face. The court granted plaintiffs leave to amend to allege facts showing that the ordinance is unconstitutional as applied, but plaintiffs subsequently dismissed this aspect of the complaint. Plaintiffs appeal from the trial court's order granting defendants judgment on the pleadings. The sole question before us, therefore, is whether the ordinance is invalid on its face.[2]

After the case was fully briefed on the merits in the Court of Appeal, but before that court rendered its decision, the United States Supreme Court decided *Community Commu-*

[2] While the case was pending on appeal the Berkeley electorate enacted the "Tenants' Rights Amendments Act of 1982," revising certain sections of the ordinance, including two sections relevant to our inquiry in this case: section 11, quoted *post* at page *, footnote 44, and section 14, quoted *post* at page **, footnote 54. Although the amendment was not before the trial court at the time it held the ordinance facially constitutional, any issues that may arise as a result of the amendments are questions of law and thus may be properly resolved by this court in determining facial validity. Therefore we will review the regulation as amended.

* *Infra* A-47.

** *Infra* A-54.

nications Co. v. *City of Boulder* (1982) 455 U.S. 40, holding a home rule municipality subject to federal antitrust scrutiny. We granted hearing, and soon thereafter the issue of the effect of *Boulder,* and antitrust law generally, was raised for the first time by amicus curiae. Both parties and additional amici curiae for both parties were granted leave to file, and have filed, supplemental briefs addressing inter alia antitrust issues generally, and the *Boulder* issue specifically.

Therefore, although plaintiffs claim the ordinance is facially invalid in whole or in part on due process and statutory grounds, they also assert that an alleged conflict between the ordinance and federal antitrust law presents a threshold issue dispositive of this appeal. Defendants likewise request that we address and resolve plaintiffs' antitrust contentions.[3] Because of the extreme importance of the issues presented, we proceed to analyze plaintiffs' antitrust claims.

[3] It is well settled that a court will consider on appeal a new point of law decided while the appeal is pending. (Claremont Imp. Club v. Buckingham (1948) 89 Cal.App.2d 32, 33.) Although prior to *Boulder* there existed a plausible basis for alleging a municipal regulation to be in conflict with antitrust laws pursuant to *City of Lafayette* v. *Louisiana Power & Light Co.* (1978) 435 U.S. 389 (discussed *post,* pp. - *), that case involved proprietary, rather than regulatory conduct, and hence such a claim could not reasonably have been expected to survive demurrer. In a real sense, therefore, the spectre of antitrust scrutiny of municipal regulatory conduct first arose in *Boulder.*

It is also established that on appeal from judgments granting or denying an injunction, the court applies the law that is current at the time of the decision. (*Cal-Dak Co.* v. *Sav-On Drugs, Inc.* (1953) 40 Cal.2d 492, 496-497 [congressional amendment of antitrust laws while appeal pending given effect to exempt a manufacturer from Sherman Act §1 charges]; see also *M Restaurants, Inc.* v. *San Francisco Local Joint Exec. Bd. Culinary etc. Union* (1981) 124 Cal.App.3d 666, 673.) Further, we have held that parties may advance new theories on appeal when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy. (*Frink* v. *Prod* (1982) 31 Cal.3d 166, 170 (plurality decision); *Carman* v. *Alvord* (1982) 31 Cal.3d 318, 324; *UFITEC, S.A.* v. *Carter* (1977) 20 Cal.3d 238, 249, fn. 2; *Wong* v. *Di Grazia* (1963) 60 Cal.2d 525, 532, fn. 9; *Tyre* v. *Aetna Life Ins. Co.* (1960) 54 Cal.2d 399, 405; *Burdette* v. *Rollefson Construction Co.* (1959) 52 Cal.2d 720, 725-726.) In *Di Grazia,* supra, we rejected defendants' contention that because an issue regarding the rule against perpetuities had not been raised at trial, it would be improper for this court to address the question on appeal. Justice Tobriner, writing for the court, suggested that defendants' contention was meritless, and that "in any event, the issue as to the rule against perpetuities [is of]

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I.

Antitrust Issues

In *Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129, we held Berkeley's former rent control ordinance facially unconstitutional because its procedures for rent adjustment were "inexcusably cumbersome" and would have deprived landlords of due process if permitted to take effect. (Id. at p. 173.) Before reaching that conclusion, however, we addressed the threshold question of the city's power to provide for rent control. We observed that our Constitution confers on all cities and counties the power to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with the general laws" (Cal. Const., art. XI, § 7) and noted that "[a] city's police power under this provision can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself." (17 Cal.3d at p. 140.) Although there is extensive regulation governing various aspects of landlord-tenant relations, "California has no state rent control statute." (Id. at p. 141.) We therefore concluded that the Berkeley ordinance was within the city's police power: there was "no legislative indication of 'a paramount state concern [which] will not tolerate further or additional local action.' " (Id. at p. 142, quoting *In re Hubbard* (1964) 62 Cal.2d 119, 128.)

Conceding that local rent control is not preempted by state law, plaintiffs champion federal antitrust law in order to attack *Birkenfeld's* premise that the police power of a city is as broad as that power exercisable by the Legislature.

Plaintiffs observe that although our state Constitution grants cities police power equal to that of the state, we are duty-

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considerable public interest; it has been fully argued before this court; we, accordingly, dispose of the issue on its merits." (60 Cal.2d 525, 532, fn. 9.) We believe that the validity of municipal rent controls under antitrust law raises extremely significant issues of public policy and public interest. (See, e.g., Goodrich, *The Limits of Municipal Power* (Mar. 1984) 4 Cal. Law. 26; Speigel, *Local Governments and the Terror of Antitrust* (1983) 69 A.B.A.J. 163.)

bound under the supremacy clause of the federal Constitution (art. VI, § 2) to invalidate a municipal regulation that on its face violates paramount federal law. (*Sail'er Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1, 10-11.) They argue that (1) the city's ordinance, on its face, conflicts with federal antitrust law; that (2) under *Boulder,* the ordinance is not exempt from antitrust scrutiny, and hence (3) defendants have no authority to enforce the regulation in question. We clearly have jurisdiction to decide such claims. (*Rice* v. *Norman Williams Co.* (1982) 458 U.S. 654, 659-661; see *Rice* v. *Alcoholic Beverage Control Appeals Bd.* (1978) 21 Cal.3d 431, 439-446 [state retail price maintenance scheme for distilled liquor invalidated under § 1 of the Sherman Act]; *Midcal Aluminum, Inc.* v. *Rice* (1979) 90 Cal.App.3d 979, 982-984 [enjoining enforcement of state wholesale price maintenance scheme for wine as invalid under § 1 of the Act], affd. *sub nom. California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.* (1980) 445 U.S. 97; *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.* (1979) 87 Cal.App.3d 996, 999-1000 [invalidating state retail price maintenance scheme under *Rice* v. *Alcoholic Beverage Control,* supra].)[4]

A. State Action, Municipal Action, and Federal Antitrust Law

In order to prohibit private businesses from practicing various anticompetitive activities in interstate commerce, nearly a century ago the United States Congress exercised its broad authority under the commerce clause (U.S. Const., art. I, § 8, subd. (3)) to enact the Sherman Act. (Pub. L. No. 51-190, 26

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[4] We are aware that some decisions broadly declare that "state courts have no jurisdiction to construe or enforce the federal antitrust laws." (*Classen* v. *Weller* (1983) 145 Cal.App.3d 27, 34, fn. 2 [concession by counsel]; *Union Oil* v. *Chandler* (1970) 4 Cal.App.3d 716, 726.) Plaintiffs in this case, however, do not seek a private remedy against defendants; instead, they seek to enjoin enforcement of a local regulation alleged to be facially unconstitutional under the supremacy clause. It is clear that state courts may both construe and "enforce" the federal antitrust statutes for the purpose of ruling on such facial attacks. (*Rice* v. *Norman Williams Co.* (1982) 458 U.S. 654, 658, fn. 4, revg. on other grounds *Norman Williams Co.* v. *Rice* (1980) 108 Cal.App.3d 348, 354, fn. 2.) We do not construe *Classen* or *Union Oil* to suggest that state courts lack jurisdiction to review facial attacks premised on alleged conflict with federal antitrust laws.

Stat. 209 (1890) codified as amended at 15 U.S.C. §§ 1-7; see *Parker* v. *Brown* (1943) 317 U.S. 341, 351, citing Remarks of Sen. Sherman, 21 Cong. Rec. 2457, 2562 (1890).) Two sections of the Act are relevant to the present case. Section 1 declares that all contracts, combinations or conspiracies in restraint of interstate commerce to be illegal. Section 2 declares that the act of monopolizing, or attempting to monopolize any part of interstate commerce is illegal. Quite obviously, if defendants' ordinance conflicts with the Act, and further, if it is not exempt from antitrust scrutiny, the supremacy clause of the federal Constitution requires that we declare the ordinance invalid.

Over 40 years ago, the Supreme Court in *Parker,* supra, held this state's raisin marketing program, which restricted competition and maintained prices in order to protect the local raisin market, was not subject to federal antitrust scrutiny. The court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. [¶] The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . . [¶] There is no suggestion of a purpose to restrain state action in the Act's legislative history." (317 U.S. at pp. 350-351.) The *Parker* court concluded that "[t]he state in adopting and enforcing the . . . program . . . as a sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (Id. at p. 352.)

In a series of cases over the last decade the United States Supreme Court has considered the extent to which private, or nongovernmental, business enterprises may come under the protection conferred in *Parker*.[5] And in two recent decisions, the court has addressed the conditions under which local

[5] In *Goldfarb* v. *Virginia State Bar* (1975) 421 U.S. 773, the court held minimum fee schedules for lawyers enforced by the state bar subject to scrutiny under the Act. The state bar's status as an agent of the state supreme

(Footnotes continued on following page)

governments may gain *Parker* protection. The first case, *City of Lafayette* v. *Louisiana Power & Light Co.* (1978) 435 U.S. 389, involved two Louisiana municipalities that owned and operated their own electric utility systems. *Louisiana Power* alleged that the municipalities had engaged in illegal tying arrangements with their customers.

(Footnotes continued from preceding page)

court did not make its fee schedule "state action" because such anticompetitive conduct was not "compelled by direction of the State acting as a sovereign." (Id. at p. 791.) The court again denied protection from antitrust scrutiny in *Cantor* v. *Detroit Edison Co.* (1976) 428 U.S. 579. In that case the state public utility commission approved an anticompetitive tariff requiring the defendant to provide its customers "free" light blubs. Rejecting the utility's argument that commission approval "compelled" it to operate the light bulb distribution program despite its anticompetitive effects, the court held that mere approval was insufficient to invoke state action protection because it signified only state neutrality toward the conduct in question. (Id. at p. 585.)

In the following year, the court recognized state action protection in *Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350. In *Bates* the state supreme court, acting as the state's ultimate authority over the practice of law, promulgated American Bar Association-sponsored disciplinary rules banning lawyer advertising. The United States Supreme Court held that "[a]lthough the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the [State Bar] acts as the agent of the court under its continuous supervision." (Id. at p. 361.) The court concluded that the state's anticompetitive policy was "clearly and affirmatively expressed" (id. at p. 362), and that the state bar's conduct was sufficiently compelled by the state to warrant protection from antitrust scrutiny. (Id. at p. 363.)

In *New Motor Veh. Bd. of Cal.* v. *Orrin W. Fox, Co.* (1978) 439 U.S. 96, and *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.* (1980) 445 U.S. 97, the court again addressed the state action exemption as it applies to private business enterprises. In *Orrin Fox* the court held that a state-imposed scheme that restricted intrabrand competition in the sale of new automobiles was exempt from scrutiny under the antitrust laws because the program operated under "clearly articulated and affirmatively expressed" legislative guidelines. (439 U.S. at p. 109.) In *Midcal,* on the other hand, the court held that a state-imposed maximum resale price maintenance system, affecting all wine producers and wholesalers in this state, was not exempt from antitrust laws. Although the scheme was " 'clearly articulated and affirmatively expressed as state policy,' " it was not " 'actively supervised' by the State itself." (445 U.S. 105, quoting *Lafayette,* supra, 435 U.S. 389, 410 (plur. opn.).)

Most recently, in *Hoover* v. *Ronwin* (1984) ___U.S.___, 104 S.Ct. 1989, the court, on a 4-3 vote, found Arizona state bar examiners exempt from antitrust scrutiny. The majority held the examiners' actions constituted action of the sovereign itself, and hence exempt from antitrust scrutiny under *Parker* (id. at p. , 104 S.Ct. at p. 1995). Therefore, the majority found it unnecessary to consider whether the alleged anticompetitive policy was "clearly articulated" or "actively supervised." (Id. at p. ; 104 S.Ct. at pp. 1995-1996.)

The majority rejected the municipalities' contention that antitrust laws were intended to protect only against abuses by private businesses and are not applicable to municipalities that "exist to serve the public weal." (Id. at p. 403.) The court observed that the defendants were not motivated solely by desire to benefit the public. Instead, like "[e]very business enterprise" (ibid.), their decisions may be motivated by the goal of "realizing maximum benefits to [themselves] without regard to extraterritorial impact and regional efficiency." (Id. at p. 404.) A majority therefore rejected the argument that the two municipalities—both of which "act[ed] as owners and providers of services" (id. at p. 408), were immune from antitrust scrutiny.

A plurality opinion by Justice Brennan then rejected the contention that municipalities, simply by reason of their status as such, are exempt from antitrust laws. "*Parker's* limitation of the exemption . . . to 'official action directed by [the] state,' arises from the basis for the 'state action' doctrine—that given our 'dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,' 317 U.S., at 351, a congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred. To extend that doctrine to municipalities would be inconsistent with that limitation. Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them." (435 U.S. at pp. 411-412.) Still, the plurality suggested, a municipality could come under the *Parker* exemption if it acts pursuant to state policy to displace competition with regulation or monopoly public service. Deviating slightly from the court's requirement in the private business enterprise cases that the state must have "compelled" the conduct in order for the activity to come within the *Parker* exemption (*ante*, p. *, fn. 5), the plurality stated that state direction or authorization of the anticompetitive conduct would be sufficient to trigger the exemption for municipalities. (Id. at p. 417.)[6]

[6] Four justices dissenting, led by Justice Stewart, maintained that exemption applied because "petitioners are governmental bodies, not private persons, and their actions are 'act[s] of government' which *Parker* v. *Brown* held are not subject to the Sherman Act." (435 U.S. at p. 426.)

In a concurrence, Chief Justice Burger emphasized his view that the municipalities' ownership and operation of utility companies constituted business activities pursuant to their proprietary functions (id. at p. 422-425), and hence any question of exemption should meet the more stringent "compulsion" standard applicable to private parties seeking the protection of *Parker*. The Chief Justice appeared to suggest that municipalities' nonproprietary activities should be exempt from antitrust scrutiny.

Four years later the United States Supreme Court decided *Community Communications Co.* v. *City of Boulder*, supra, 455 U.S. 40. The city, apparently acting in its regulatory capacity, placed a moratorium on expansion of plaintiff's cable television service for three months in order to allow competing companies to make bids to enter a new geographic market under a proposed model ordinance.[7] Plaintiff sued to enjoin the moratorium, claiming inter alia that it constituted a conspiracy between the city and a potential competitor, and that it restrained trade in violation of section 1 of the Sherman Act. The district court granted an injunction, rejecting the city's argument that its actions were protected as a valid exercise of its police power, or that it was exempt from antitrust scrutiny under *Parker*. A divided Tenth Circuit Court of Appeals reversed, distinguishing *Lafayette* on the ground that, in contrast to the activity in that case, "no proprietary interest of the City is here involved." (630 F.2d 704, 708.) The United States Supreme Court in turn reversed, holding over the dissent of Justice Rehnquist that the city's ordinance "cannot be exempt from antitrust scrutiny unless it constitutes the action of the State . . . itself in its sovereign capacity, see *Parker*, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette* . . . ." (*Boulder*, supra, 455 U.S. 40, 52.) The court rejected the city's argument that merely because the state, under its home rule amendment, had vested the city with "'"*every power* theretofore possessed by the legislature . . . in

[7] Plaintiff was assignee of a 20-year, revocable, nonexclusive permit to conduct a cable television business within the city limits. (455 U.S. at p. 44.)

local and municipal affairs" ' " (id. at p. 52, emphasis in original), regulation of cable television was therefore an " 'act of government' performed by the city *acting as the state* in local matters . . . ." (Id. at p. 53, emphasis in original.) Granting of home-rule power, the court reasoned, merely indicates neutrality respecting the challenged actions, and does not satisfy the " 'clear articulation and affirmative expression' " of state policy requirement. (Id. at p. 55.) The court reiterated the *Lafayette* plurality's view that the *Parker* exemption is premised on sovereignty, and that because municipalities are not sovereign, they fall outside the exemption. (Id. at pp. 50-51.)

Accordingly, much of the parties' energy in the present case has been directed toward arguing their respective views as to whether defendants' ordinance falls within or without the *Boulder* state action exemption.[8] Consideration of *Boulder's* exemption standard at this stage in our analysis, however, is premature. Application of the state action exemption principle becomes necessary only after we determine that there is "truly a conflict between the Sherman Act and the challenged regulatory scheme." (*First American Title Co. of South Dakota* v. *South Dakota Land Title Ass'n* (8th Cir. 1983) 714 F.2d 1439, 1452; see also *Rice* v. *Norman Williams Co.*, supra, 458 U.S. 654, 662, fn. 9; *Midcal*, supra, 445 U.S. 97, 102; *Parker*, supra, 317 U.S. 341, 350; *Rice*, supra, 21 Cal.3d 431, 439-446; *Lewis-Westco & Co.* v. *Alcoholic Beverage Control Appeals Bd.* (1982) 136 Cal.App.3d 829, 834-837.)

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[8] Justice Rehnquist, writing for the dissent in *Boulder*, correctly noted that the *Parker* court cast its decision in the language of preemption. (*Parker*, supra, 317 U.S. 341, 351.) *Parker*, which was a suit to enjoin enforcement of a state statute, has been characterized by *Boulder* and *Lafayette*, however, as establishing a state action exemption from antitrust laws. (455 U.S. 40, 43; 435 U.S. 389, 394.) Unlike *Parker*, both of these latter cases were private antitrust suits for damages, not invalidation of a regulation. In the court's most recent case in this area, *Rice* v. *Norman Williams Co.* (1982) supra, 458 U.S. 654, the plaintiffs sought to enjoin enforcement of one of this state's liquor statutes. Consistently with *Parker*, the court framed its analysis in terms of preemption. In view of these cases, we agree with plaintiffs and amici that the question in the present appeal is whether defendants' regulation conflicts with, and hence is preempted by, the Sherman Act.

B. Facial Validity of the Ordinance Under Section 1 of the Sherman Act

Plaintiffs contend that the ordinance, on its face, conflicts with, and hence is preempted by, section 1 of the Sherman Act. (See *ante*, fn. 8.) That section states: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." (15 U.S.C. § 1.)

Defendants and amici broadly respond that no provision of the Act was intended to apply to city ordinances designed to protect or further local health, safety, or general welfare, and hence the ordinance in question cannot violate the antitrust laws. They suggest that only local legislation designed to achieve commercial or proprietary interests—either from city ownership of property or through fees or taxes pursuant to franchise awards—are properly subject to antitrust scrutiny.

Although defendants' view has rational appeal, we are bound by the United States Supreme Court's implicit rejection of that theory in *Lafayette* and *Boulder*. In both of those cases the court addressed the applicability of state action exemption to municipal defendants. However, in order to reach the question of exemption from antitrust laws, in both decisions the court necessarily assumed that each case presented a violation of antitrust laws. (E.g., *First American Title Co.*, supra, 714 F.2d 1439, 1451-1452.) While standing alone, *Lafayette* could be read to support defendants' view that only the commercial activities of municipalities are subject to antitrust scrutiny (*Lafayette*, 435 U.S. 389, 418-426, Burger, C.J., conc.), we must conclude that *Boulder* forecloses any argument that the Act does not apply to a municipality's "noncommercial" activities. The alleged anticompetitive activity in that case concerned merely the imposition of a three-month moratorium on expansion of petitioner's cable television franchise while the city studied the need for increased regulation. Whereas the facts of *Boulder* strongly suggest that the moratorium was imposed pursuant to the city's regulatory authority, still the court's resolution of the state action exemption issue necessarily assumed an antitrust violation; moreover, the court did not even

mention the possibility of a broader, preliminary exemption from antitrust scrutiny for "nonproprietary" municipal activity.[9]

Therefore, we must conclude that the United States Supreme Court necessarily and implicitly rejected defendants' view in *Boulder.* (McMahon, *Recent Significant Developments in "State Action" and Noerr-Pennington Exemptions: From Boulder to the "Sham" Exception* (1983) Toledo L.Rev. 531, 540-541.) As we shall explain below, however, defendants are correct when they assert that the antitrust laws are aimed chiefly at commercial activities. And, as demonstrated below, this fact must influence the question of how, and to what extent, traditional antitrust rules apply to municipal defendants.

We turn now to plaintiffs' claim under section 1 of the Sherman Act. To prove a facial conflict with section 1 in the present case, plaintiffs must establish as a matter of law (a) that two or more "persons" acted in concert, (b) that the activities complained of affect interstate commerce, and (c) that the action constitutes an unreasonable restraint on commerce.[10] A court may invalidate an ordinance in the abstract "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *(Rice* v. *Norman Williams Co.,* supra, 458 U.S. 654, 661.)

[9] In this regard, we must also reject defendants' attempt to distinguish *Boulder* on the ground that the city in that case stood to acquire revenues from its franchise awards. Again, it must be noted that the challenged activity in *Boulder* concerned not collection of franchise fees, but merely the city's imposition, under its regulatory powers, of a three-month moratorium on expansion of petitioner's franchise. Nowere in the court's majority, concurring, or dissenting opinions is it even suggested that resolution of the case rested on defendants' "revenue generating" theory. If in fact the United States Supreme Court had found that city's apparent interest in collecting fees for its franchise awards to be determinative, we believe that court would have said so somewhere in its opinion.

[10] Plaintiffs and amici argue that a local enactment is preempted by federal law not only when its operation would bring it expressly within the federal statute, but also whenever its operation would frustrate the broad objectives that underlie federal legislation. (See *Hines* v. *Davidowitz* (1941) 312 U.S. 52, 67 (the test of preemption is whether the state law stands "as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress").) See generally, Posner, *The Proper Relationship Between State*

(Footnotes continued on following page)

Both parties vigorously contest whether in this case plaintiffs can or cannot prove the requisite concerted action and effect on interstate commerce. Although we do not agree with plaintiffs' suggestion that these "technical" requirements should be ignored in a facial attack seeking "mere invalidation" instead of damages *(ante,* fn. 10), we need not address these issues now[11] because we have determined that, in any event, plaintiffs cannot prove that the ordinance on its face mandates an unreasonable restraint of trade and hence irreconciliably conflicts with section 1 of the Sherman Act. (458 U.S. at p. 661.)[12]

1. Unreasonable Restraint

a. Application of Traditional Antitrust Law to Municipal Defendants. We recognize at the onset that this case forces us to wander off the map and travel cross country without the benefit of trail or compass. Although *Boulder* clearly held municipalities subject to antitrust laws, the court specifically declined to address the issue of the applicability of traditional antitrust rules or standards against which municipal defendants are to be judged. *(Boulder,* supra, 455 U.S. 40, 56, fn. 20.) Significantly, however, the *Boulder* court strongly suggested

(Footnotes continued from preceding page)

Regulation and the Federal Antitrust Laws (1974) 49 N.Y.U.L.Rev. 693, 698-703 (suggesting that the federal policy of free and open competition can be applied to prevent the operation of state law that clearly transgresses the "spirit of the Sherman Act," "even if the conflict is not within the express language of the federal statute"). We are not convinced that such a broad view is warranted or that the United States Supreme Court has embraced it. Indeed, the court has recently indicated that it will not follow plaintiffs' approach: the court stated that "[a] state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect" (*Rice* v. *Norman Williams Co.,* supra, 458 U.S. 654, 659) and suggested that it will invalidate state legislation in the abstract "only if it mandates . . . a *violation* of the antitrust laws in all cases . . . ." (Id. at p. 661, emphasis added.) Because it is necessary to prove the requisite concerted action and interstate commerce elements in order to prove a violation of section 1, the court's statement must reasonably be construed to require proof of those elements even in a facial attack such as this.

[11] It is therefore unnecessary to discuss either the "intraenterprise" or the *Noerr/Pennington* issues raised in the briefs.

[12] Compare, Comment, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases* (1983) 132 U.Pa.L.Rev. 121, 142.

that municipalities and private business enterprises may be subject to different standards: the court repeated *Lafayette's* suggestion that " '[i]t may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government.' " (Ibid., citing *Lafayette,* supra, 435 U.S. 389, 417, fn. 48.) Similarly, the *Boulder* dissent observed that under the majority's rule, the courts "must now adapt antitrust principles to adjudicate Sherman Act challenges to local regulation of the economy." (455 U.S. at p. 65.) Anticompetitive conduct by a municipality in exercise of its legitimate police power is indeed of a "different complexion" than similar conduct engaged in by private business enterprises and therefore, as the *Boulder* court suggested, courts must adapt or modify the application of traditional antitrust rules when reviewing the acts of municipal defendants.

The United States Supreme Court has often noted that the purpose of antitrust law is the regulation of anticompetitive business practices. The Sherman Act relates to " 'business competition' " (*Apex Hosiery Co.* v. *Leader* (1940) 310 U.S. 469, 493, fn. 15) and is designed to regulate "combinations of business and capital organized to suppress commercial competition . . . ." (*United States* v. *SouthEastern Underwriters Ass'n* (1944) 322 U.S. 533, 553; see also *Parker,* supra, 317 U.S. 341, 351; 1 Kintner, Federal Antitrust Law (1980) § 4.18 [summarizing an exhaustive analysis of the legislative history of the Act]; cf. Bork, *Legislative Intent and the Policy of the Sherman Act* (1966) 9 J.L. & Econ. 7.) One commentator has observed that "[t]he Court has been reluctant to apply antitrust laws to the conduct of those who are not engaged in commercial activities." (Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies* (1983) 32 Cath.U.L. Rev. 395, 397-398.) Indeed, the court has said that the Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." (*Klor's, Inc.* v. *Broadway-Hale Stores, Inc.* (1959) 359 U.S. 207, 213, fn. 7.) Similarly, the court noted in *Goldfarb,* supra, that it would be "unrealistic" to

"automatically . . . apply to the professions antitrust concepts which originated in other areas." (421 U.S. 773, 788, fn. 17.)

Traditional antitrust rules have been fashioned over the years in the context of private business regulation. Many of the rules are premised implicitly, sometimes explicitly, on assumptions about how rational business competitors behave in their quest for greater profit. Municipal governments, on the other hand, most often act on the basis of different motives. Unlike a private business, a municipal government's decision to displace competition is generally motivated by the purpose of furthering local health, safety or welfare. When acting in its regulatory capacity, a local government is both authorized to act in accordance with, and entrusted with the duty of serving, the public weal. Just as courts should proceed cautiously lest they might unnecessarily interfere with rights of local self-governance (Frug, *The City as a Legal Concept* (1980) 93 Harv.L.Rev. 1059; Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases* (1982) 61 Tex.L.Rev. 481, 490, fn. 50, 514; 1 DeTocqueville, *Democracy in America* (Mayer ed., Lawrence trans. 1969) pp. 90-91 and *passim*), so too courts must be attentive and sensitive to the legitimate motives behind municipal regulations. Therefore, contrary to the urging of plaintiffs and amici, we will not mechanically apply to municipalities rules of law fashioned exclusively in the different context of private business regulation. Such standards will no doubt be helpful in formulating rules for the application of antitrust principles to municipalities, but if unbending application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate municipal regulation, we will not hesitate to cautiously depart from traditional rules. (Shenefield, *The Parker v. Brown State Action Doctrine and the New Federalism of Antitrust* (1983) 51 Antitrust L.J. 337, 346; Note, *The Application of Antitrust Laws to Municipal Activities* (1979) 79 Colum.L.Rev. 518, 539-543; Note, *Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place* (1983) 49 Brooklyn L.Rev. 259, 291-297 [hereinafter cited *Home Rule*]; *The Supreme Court, 1981 Term* (1982) 96 Harv.L.Rev. 268, 272-276.)[13]

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[13] See also authorities cited *post,* page *, footnote 24.

* Typed opinion page 43.

b. The Two Traditional Standards: The Rule of Reason, and the Rule of Per Se Illegality. Although the prohibition in section 1 of "[e]very contract, combination . . . or conspiracy, in restraint of trade" was at first applied literally to invalidate *all* such restraints (e.g., *United States* v. *Trans-Missouri Freight Ass'n* (1897) 166 U.S. 290, 328 ["the plain and ordinary meaning of . . . [section 1] is not limited to that kind of contract alone which is an unreasonable restraint of trade, but all contracts are included . . ." within the section's proscription]), the court soon retreated from this manichean view of the Act, holding it was not intended to strike down restraints merely ancillary or incidental to another legitimate purpose. (*United States* v. *Addyston Pipe & Steel Co.* (6th Cir. 1898) 85 F. 271, 282, mod. and affd. *sub nom. Addyston Pipe & Steel Co.* v. *United States* (1899) 175 U.S. 211, 244.) In *Standard Oil Co.* v. *United States* (1911) 221 U.S. 1, the court announced that the Act "evidenced the intent not to restrain the right to make and enforce contracts . . . which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods . . . which would constitute an interference that is an undue restraint." (Id. at p. 60; see also *United States* v. *American Tobacco Co.* (1911) 221 U.S. 106, 179 ["restraint of trade" covers only those acts that "injuriously restrain[ ] trade"].) Today, under what has become termed the "rule of reason," many restraints are analyzed in light of their economic effects on market conditions, and may be upheld if "reasonable," i.e., if the restraint "merely regulates and perhaps thereby promotes competition" instead of suppressing or destroying competition. (*Chicago Bd. of Trade* v. *United States* (1918) 246 U.S. 231, 238.)

Some types of restraints, however, were never given such accomodating review. Cartels—agreements among producers to set prices above the competitive level by lowering production—were early declared illegal "per se," and the courts refused to consider arguments that prices set by a cartel were "reasonable." (Note, *Fixing the Price Fixing Confusion: A Rule of Reason Approach* (1983) 92 Yale L.J. 706, 710-712 [hereinafter *Price Fixing Confusion*].) Whereas these cases focused on cartel behavior (e.g., *United States* v. *Trenton*

Potteries Co. (1927) 273 U.S. 392; see *Price Fixing Confusion*, supra, at p. 712, fn. 38; Comment, *The Per Se Illegality of Price-Fixing—Sans Power, Purpose, or Effect* (1952) 19 U.Chi.L.Rev. 837, 855) and refused to consider economic reasonableness on the assumption that cartels were themselves evils to be eradicated (e.g., Bork, supra, 9 J.L. & Econ. at p.11), the United States Supreme Court in 1940 significantly expanded the universe of price-related agreements subject to an irrebuttable presumption of illegality. In *United States* v. *Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, the court, through Justice Douglas, inferred the existence of a cartel from the defendants' agreement to buy surplus oil. *Socony*, however, focused on price fixing itself rather than the inferred cartel; the court stated that whether the parties actually could or did succeed in fixing prices was irrelevant, and broadly characterized the proscribed conduct of price fixing: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se* . . . . [¶] [T]he machinery employed . . . is immaterial." (Id. at p. 223.) "Any combination which tampers with price structures is engaged in an unlawful activity." (Id. at p.221.)

The focus of attention since *Socony* has been on whether defendants have in any way agreed on a course of conduct affecting prices: if the label "price fixing" is found to fit the conduct in question,[14] the courts have mechanically declared such conduct illegal "even though no invidious purpose or harmful economic consequences have been established, and even though the economic results of the conduct may be of net benefit to consumers." (*Price Fixing Confusion*, supra, 92 Yale L.J. at p. 714; see *Arizona* v. *Maricopa County Medical Soc'y*

[14] The court has at times declined to treat as illegal per se, conduct seemingly within *Socony's* broad price-fixing definition. (E.g., *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys., Inc.* (1979) 441 U.S. 1, 20 [blanket licenses not illegal per se even though music associations "fixed" license prices, because such licenses created a market efficiency, i.e., a product different from individually licensed compositions].) It has been suggested that " 'price fixing' is no more than a label given to arrangements that have been found unlawful per se." (Easterbrook, *Maximum Price Fixing* (1981) 48 U.Chi.L.Rev. 886, 887.)

(1982) 457 U.S. 332 [member physicians' "foundations" to set maximum fees charged to insurance plan patients illegal per se price fixing].) The per se rule reflects an irrebuttalbe presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason. (Id. at p. 344; *Northern Pac. Ry.* v. *United States* (1958) 356 U.S. 1, 5.)

Although the price-fixing illegal per se rule has its adherents, and is asserted to be economically reliable and administratively efficient,[15] it has also suffered steady and growing criticism as an often arbitrary, mechanical, and inconsistently applied rule that ignores the realities of market power and net economic effects.[16] Of course, we are not here concerned with the wisdom or efficacy of the per se rule as it applies to price fixing in the typical case against private business defendants.

[15] E.g., Kaysen & Turner, Antitrust Policy: An Economic and Legal Analysis (1959) page 142 (rule is relatively clear, self-enforcing, and administratively efficient); Scherer, Industrial Market Structure and Economic Performance (2d ed. 1980) page 510 (abandoning the rule would lead to uncertainty, complex litigation, and undue burdens on courts and administrative agencies); Redlich, *The Burger Court and the Per Se Rule* (1979) 44 Alb.L.Rev. 1 (rule protects competitors' right to make independent judgments regarding price); Rahl, *Price Compeition and the Price Fixing Rule—Preface and Perspective* (1962) 57 Nw.U.L.Rev. 137 (rule provides a clear guide for business conduct and a simplified approach to resolving cases); Adams, *The "Rule of Reason": Workable Compeition or Workable Monopoly?* (1954) 63 Yale L.J. 348 (criticizing attacks on the rule) Note, (1983) 57 Tulane L.Rev. 994 (*Maricopa* properly reaffirmed the per se illegality of price fixing agreements).

[16] E.g., Easterbrook, *Maximum Price Fixing* (1981) U.Chi.L.Rev. 886 (maximum price fixing is almost always beneficial to consumers, and hence should not be subject to per se analysis); Elman, *"Petrified Opinions" and Competitive Realities* (1966) 66 Colum.L.Rev. 625 (per se rule should not be mechanically applied to vertical maximum resale price agreements); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division pt. II* (1965) 75 Yale L.J. 373 (use of per se rules outside context of horizontal price-fixing agreements destroys efficiency and misallocates resources); von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law* (1964) 11 UCLA L. Rev. 569 (cautioning against mechanical application and adoption of per se rules); Director & Levi, *Law and the Future: Trade Regulation* (1956) 51 Nw.U.L.Rev. 281 (suggesting that price fixing should not be condemned as illegal per se unless it affects the market); Jaffe & Tobriner, *The Legality of Price-Fixing Agreements* (1932) 45 Harv.L.Rev. 1164 (proposing abolition of the "arbitrary" per se rule against price fixing, in favor of the rule of reason); *Price Fixing Confusion*, supra, 92 Yale L.J. at p. 714, & *passim*.

Nevertheless, we question whether the rule should be extended to cover the municipal defendants in this case. Therefore, although plaintiffs urge us to declare the ordinance facially invalid because it represents blatant, albeit government-imposed, vertical and horizontal[17] fixing of maximum prices, we must first pause to consider whether these municipal defendants should be subject to the per se rule, the rule of reason, or a more accommodating standard.

c. Purpose and Applicability of the Per Se Rule Against Price Fixing. Of course, "it is . . . improper to dispose of an antitrust case by invoking a per se rule unless the challenged practice really fits the policy and rationale of the rule." (Elman, *"Petrified Opinions" and Competitive Realities* (1966) 66 Colum.L.Rev. 625, 627; cf., *Boulder,* supra, 455 U.S. 40, 65, Rehnquist, J., dis. [questioning whether per se rules of illegality will apply to municipal defendants in the same manner as they apply to private business defendants].) Because we determine below that the two principal justifications for the rule's application to private business enterprises—economic reliability and ease of administration[18]—are not implicated in the situation before us, we must conclude that the per se rule has no place in this case.

(i) Economic Reliability

The per se rule is thought to be economically reliable because, the courts assume, price fixing almost always has anticompetitive effects and almost never has procompetitive effects or "redeeming virtue." Although it is unquestionable that the United States Supreme Court has long viewed price fixing by private business enterprises as illegal per se (e.g., *Monsanto Co.* v. *Spray-Rite Service Corp.* (1984) ____ U.S. ____, ____, 104 S.Ct. 1464, 1469), we note that the court has never addressed the question whether the same rule applies to the same conduct by municipalities. Moreover, just as the Supreme Court in the past has declined to apply the per se rule

[17] Plaintiffs assert that the ordinance creates a coercive vertical combination between the Board and individual landlords and furthermore that it creates a horizontal combination among all covered landlords.

[18] *Maricopa*, supra, 457 U.S. at pages 343-354.

in circumstances that pose previously unaddressed questions of economic effect (cf. *White Motor Co.* v. *United States* (1963) 372 U.S. 253, 261 [refusing to apply a new per se rule]; but see, *Maricopa,* supra, 457 U.S. 332, 349 [applying an established per se rule to a "new" industry]), we too are reluctant to announce at this early stage, and without the benefit of any evidence regarding the economic consequences of locally imposed rent controls, that price fixing implemented by a local government necessarily produces negative net anticompetitive effects or that it lacks "any redeeming virtue." (*Continental T.V., Inc.* v. *GTE Sylvania Inc.* (1977) 433 U.S. 36, 50; see *post,* p. ,* fn. 20.)

The court's conclusion that price fixing by private business defendants is "invariably anticompetitive," is based on a fear that even if prices are reasonable when set, by sanctioning such behavior the courts would facilitate fixing of unreasonable prices in the future. (*Socony,* supra, 310 U.S. 150, 221; *Trenton Potteries,* supra, 273 U.S. 392, 397.) In the context of price fixing by a cartel, the *Trenton Potteries* court observed that "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed." (273 U.S. 392, 397.) The *Socony* court echoed this concern, noting that "[t]hose who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system." (310 U.S. 150, 221.)

The court's fear of facilitating such "predatory" activity is grounded on assumptions about how unrestrained business competitors will act if given the opportunity. These assumptions have no place in the present case, however. There is

* *Infra* A-25.

nothing to suggest that the named defendants are acting for their own selfish purposes with a view toward securing market control and hence price control in the future. Quite the contrary, defendants' sole and only legitimate purpose is to serve the public welfare as described in section 3 of the ordinance. When that purpose no longer exists—i.e., when annual average citywide rental vacancies exceed 5 percent over a six-month period—the ordinance provides for lifting of rent controls until the vacancy rate again falls below 5 percent. (§ 6, subd.(q).) We therefore conclude that neither the presumption that price fixing is invariably anticompetitive, nor the fear of facilitating "predatory" practices—both concerns that have been expressed by the United States Supreme Court in the context of analyzing the conduct of private business defendants—justifies application of the per se rule to municipalities acting in their legitimate governmental capacities.

(ii) Ease of Administration

The per se rule is also said to be justified by its ease of judicial administration. Both the *Trenton Potteries* and the *Socony* courts further explained refusal to inquire into the reasonableness of set prices on the ground that such a review would necessitate constant detailed supervision and analysis by the government to assure that reasonable prices remain reasonable as economic conditions vary. (273 U.S. 392, 397-398; 310 U.S. 150, 221.)[19] Recently, the *Maricopa* court stated that the high costs associated with "elaborate inquiry into . . . reasonableness" was a major justification for analyzing maximum price fixing in the health care industry under the per se rule. (457 U.S. 332, 343-344.)

Certainly, the judicial task is easier when the question is changed from "does the conduct unreasonably restrain competition" to "have defendants engaged in price fixing." Resort to this rule of administrative convenience, however, can be justified only if the costs "of formulating the rule, and of the overinclusiveness that inevitably accompanies it—are less than

[19] Likewise, it has long been recognized that courts are poorly suited to judge the reasonableness of prices set by businesses. (*United States* v. *Trans-Missouri Freight Ass'n* (1897) 166 U.S. 290, 331-332.)

the attendant savings in administrative costs." (*Price Fixing Confusion,* supra, 92 Yale L.J. at p. 709; see also *United States* v. *Container Corp. of America* (1969) 393 U.S. 333, 341 (Marshall, J., dis.); Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking* (1974) 3 J. Legal Stud. 257, 264-273; Easterbrook, *Maximum Price Fixing* (1981) 48 U.Chi.L.Rev. 886, 909-910; Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis, and Sylvania* (1979) 64 Iowa L.Rev. 461, 490-491.)

The potential for overinclusiveness in the present case is apparent. Whereas the United States Supreme Court in *Trenton Potteries* and *Socony* based its refusal to consider whether private business defendants had set reasonable prices largely on the absence of administrative supervision and on the impracticality of constant judicial review of such prices, the present case presents a different situation. By express provision of the ordinance, it is the Board's duty constantly to review and, if necessary, to adjust rents in order to assure each landlord a "fair return on his investment." On the face of the ordinance, rents would "be subject to continuous administrative supervision and readjustment in light of changed conditions" (*Socony,* supra, 310 U.S. 150, 221) without requiring any involvement by the courts unless a landlord chooses to exercise his right to appeal his individual adjustment. Moreover, costs of administering the program are borne by the local agency: the ordinance is designed to allow the Board efficiently to address and resolve adjustment disputes and to be financially self-supporting.

We therefore must conclude that application of the "ease of administration" justification for the per se rule would, in the present case, improperly remove from judicial scrutiny an elaborate government-enforced maximum price control and adjustment scheme not contemplated by the court's previous cases dealing with private business defendants. (See Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws* (1974) 49 N.Y.U.L.Rev. 693, 706.) We cannot say that probable economic harm, together with social costs resulting from absence of a per se rule, outweighs the risk of condemning, without any detailed inquiry, a local

government's heretofore presumed legitimate exercise of its police powers. (Cf. Bohling, supra, 64 Iowa L.Rev. at p. 491.) In our view, maximum rents price fixing, implemented by local government, is simply not of the same character as price fixing among private business defendants.[20]

Because we find neither the economic reliability justification nor the ease of administration justification applicable to municipal defendants' alleged anticompetitive behavior, we decline to subject these defendants to analysis under the per se

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[20] Surely, the ordinance at issue here is not a naked restraint of trade with no purpose except stifling of competition. (See Note, *Crawling out From Under Boulder* (1984) 34 Case Western Res. L.Rev. 303, 332-333.) In this regard, the dissent recognizes that per se rules are inapplicable if the challenged restraint has "any redeeming virtue" (*post,* p._____;* *Continental T. V. Inc.* v. *GTE Sylvania Inc.* (1977) 433 U.S. 36, 50, quoting *Northern Pacific,* supra, 356 U.S. at p. 5), but proceeds to ignore this established test, in favor of its own subjective inquiry into whether the ordinance's anticompetitive effects "override" its redeeming virtue. This unprecedented modification of *Northern Pacific-Sylvania* renders the dissent's analysis internally contradictory: at the same time the dissent recognizes the impropriety of balancing local policy against antitrust policy (*post,* p._____**), it plunges head-on to do just that by balancing a local policy's redeeming virtue against its anticompetitive effects. (*Post,* p._____***) Thus—through the thinly veiled guise of its revised standard of review—the dissent would engage in the same *Lochner*-type analysis that it purposrts to disclaim, in order to accomplish the desired result: judicial veto of local economic regulation deemed to be unwise. (Indeed, one need look no further that the titles of the dissent's authorities to see that this is the ultimate objective.)

Furthermore, even if the dissent might somehow be read to avoid such balancing, its analysis would be plainly circular. In order to determine that the per se rule of illegality of price fixing—itself a presumption—applies here, the dissent would apparently create a foundational presumption that municipal price fixing lacks "any redeeming virtue"; in other words, according to the dissent, municipal price fixing is per se illegal because it is per se meritless. This effectively guts the *Northern Pacific-Sylvania* holdings that presence of "redeeming virtue" renders per se analysis inapplicable. Finally, the dissent's suggestion that failure to apply a per se rule would somehow violate federal policy is curious at best. The Sherman Act says nothing of per se rules. The per se rule is a procedural device created by the federal courts largely for their administrative convenience; it is not a substantive rule of law. (*Northern Pacific,* supra, 356 U.S. at p. 5; *Maricopa,* supra, 457 U.S. at p. 344.) A state court violates no federal policy by declining to extend per se analysis to an unprecedented attack on municipal regulation.

* Dissenting opinion *infra* A-83.
** Dissenting opinion *infra* A-85.
*** Dissenting opinion *infra* A-86.

rule.[21] We turn, instead, to the rule of reason. If this were a typical case in which it was determined that a per se rule did not apply to a claim of facial conflict with the Sherman Act, our inquiry would end here and the parties would be left to litigate their antitrust claims at trial under the rule of reason. (*Rice* v. *Norman Williams Co.*, supra, 458 U.S. 654, 661.) We cannot take that course in this appeal, however, because, as we conclude below, the rule of reason as presently formulated is inapplicable to review of alleged conflict between municipal regulation and the Sherman Act.

d. Applicability of the Rule of Reason. In *National Soc. of Professional Engineers* v. *United States* (1978) 435 U.S. 679 the court held a professional association's price maintenance scheme illegal per se. Before reaching that conclusion, however, the court reviewed the defendant's claim that its conduct was legal under the rule of reason because it was motivated by a desire to forestall decreased quality, and hence public harm, that might result if there was unrestrained competitive bidding among engineers. The court rejected the defendant's public welfare argument: "[c]ontrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." (Id. at p. 688; *Chicago Bd. of Trade*, supra, 246 U.S. 231, 238; *Standard Oil*, supra, 221 U.S. 1, 58.) The court made clear that

[21] A third possible justification for application of per se rules, closely related to the ease of administration justification, relates to predictability. This justifiction, in turn, assumes clearly defined judicial pronouncements on prohibited and permissible conduct—an assumption that has no basis with respect to the novel question of potential federal antitrust conflict with a municipality's exercise of its police powers.

For yet another reason, the per se rule is not applicable in this case. The per se rule is itself dependent on the applicability of the rule of reason. (E.g., Note, *Antitrust Standing, Antitrust Inquiry, and the Per Se Standard* (1984) 93 Yale L.J. 1309, 1311.) As noted above, the per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blow inquiry, a violation would be found under the traditional rule of reason. If, as we conclude below, the traditional rule of reason must be modified or rejected in order to accommodate municipal defendants, it follows that traditional per se analysis cannot be applied to those defendants. (*Home Rule*, supra, 49 Brooklyn L.Rev. at pp. 294-296.)

under the rule of reason, inquiry is limited to whether the challenged conduct promotes or suppresses competition. (435 U.S. at p. 691.) The parties will not be heard to argue, and a court may not consider, whether a policy favoring competition is in the public interest. (Id. at p. 692.)

As stated above, however, we will not mechanically apply to municipal defendants rules of law developed exclusively in the context of determining private business antitrust liability. Whereas private business is motivated chiefly by the goal of increasing profits, the only legitimate purpose for municipal action is promotion of public health, safety and welfare. If courts were to judge municipal conduct under the rule of reason as it applies to private business enterprises, i.e., solely by the effect of the restraint on competition, most municipal actions would be found to violate the law: "[c]ompetition simply does not and cannot further the interests that lie behind most social welfare legislation." (*Boulder*, supra, 455 U.S. 40, 66, Rehnquist, J., dis.) At the least, such regulations would be declared void; at worst, local governments might be subject to treble damages.[22] We cannot believe that Congress intended such results to flow from a municipality's heretofore presumed legitimate exercise of its police power.[23] (Id., at p. 67 ["If municipalities are permitted only to enact ordinances that are consistent with the procompetitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed."]; Vanderstar, supra, 32 Cath.U.L.Rev. at pp. 397-400; Handler, *The Current Attack on the Parker* v. *Brown State Action Doctrine* (1976) 76 Colum.L.Rev. 2, 15; Hovenkamp, *Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy* (1981) 33 Hastings L.J. 325, 335.)

[22] See *Boulder*, supra, 455 U.S. 40, 56, footnote 20 ("we do not confront the issue of remedies appropriate against municipal officials") (but see Rehnquist, J., dis. at p. 65, fn. 2); *Lafayette*, supra, 435 U.S. 389, 401-402 (same); Areeda, Antitrust Law (Supp. 1982) par. 212.2b; *Home Rule*, supra, 49 Brooklyn L.Rev. at pages 297-299; Comment, *Antitrust Trebel Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendent?* 1980 Ariz.St.L.J. 411.

[23] See *Birkenfeld*, supra, 17 Cal.3d 129, 153-164.

To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate for the motives that underlie local government regulation (cf. e.g., Elzinga, *The Goals of Antitrust Law: Other Than Competition and Efficiency, What Else Counts?* (1977) 125 U.Pa.L.Rev. 1191), courts must develop tests that recognize a public welfare "defense" to alleged violation of the antitrust laws by municipalities. (*Boulder,* supra, 455 U.S. at pp. 66-67, Rehnquist, J., dis.; *Home Rule,* supra, 49 Brooklyn L.Rev. at pp. 294-295; Note, *The Application of Antitrust Laws to Municipal Activities* (1982) 96 Harv.L.Rev. 268, 275.)[24]

e. Facial Validity of the Ordinance Under a Modified Standard. We do not mean to suggest that rejection of the traditional rule of reason test in this case harkens return to "the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation" reminiscent of *Lochner* v. *New York* (1905) 198 U.S. 45. (*Boulder,* supra, 455 U.S. at p. 67, Rehnquist, J., dis.) Whereas the primary evil of the *Lochner* approach was an overly strict emphasis on the ends-means nexus that in turn allowed judges wide latitude to impose their own standards of reasonableness on economic and social legislation, such jurisprudence has no place in our

[24] See also McMahon, supra, 14 Toledo L.Rev. at pp. 544-545; James, *Municipal Defenses to Antitrust Liability* (1983) 6 U.Ark. Little Rock L.J. 273, 290-296; Klitzke, *Antitrust Liability of Municipal Corporations: The Per Se Rule* vs. *The Rule of Reason—A Reasonable Compromise* 1980 Ariz. St. L.J. 253, 265-273; Freilich et al., *Antitrust Liability and Preemption of Authority: Trends and Developments in Urban, State and Local Government Law* (1983) 15 Urban Law. 705, 711-713; Brame & Feller, *The Immunity of Local Governments and Their Officials From Antitrust Claims After City of Boulder* (1982) 16 U. Richmond L.Rev. 705, 715-717; Comment, *Community Communications Co.* v. *City of Boulder: Denial of Parker Exemption to Home Rule Cities* 1983 Utah L.Rev. 139, 159-160; Comment, *Affiliated Capital Corp.* v. *City of Houston: Local Governments and Antitrust Immunity* (1983) 35 Baylor L. Rev. 791, 816-818; cf. Levin, *The Antitrust Challenge to Local Government Protection of the Central Business District* (1983) 55 U.Col.L.Rev. 21, 64-79; Note, *Post Lafayette Municipal Liability for Refusing to Zone Outlying Development* (1981) 59 Wash.U.L.Q. 485, 509-510; Chu, *Antitrust Liability for Municipal Airport Operations: Will It Fly?* (1983) 49 J. Air L. & Commerce 245, 280-282; Marticorena, *Municipal Cable Television Regulation: Is There Life After Boulder?* (1982) 9 Western St.U.L.Rev. 113, 166-167.

analysis of a municipal regulation's potential conflict with the antitrust laws.[25]

In articulating an appropriate test by which to review municipal actions alleged to conflict with the federal antitrust laws, we seek on the one hand a test that is sufficiently flexible to accommodate the interest of local government in promoting public health, safety and welfare programs or regulations. At the same time, we favor a standard that is not toothless; mere incantation of a purpose to promote the public welfare should not insulate municipal regulations from invalidiation under the supremacy clause. Local governments should not be judged under a standard that will guarantee validity even for improperly motivated or implemented[26] anticompetitive municipal regulations or commercial enterprises that plainly undermine the objectives of the federal antitrust laws.

[25] For the same reason we decline to analyze municipal conduct under a so-called "municipal rule of reason." (See, e.g., James, supra, 6 U.Ark. Little Rock L.J. at pp. 296-296 [proposing such an approach]; Comment, supra, 35 Baylor L.Rev. at pp. 816-818 [same].) Whereas the rule of reason as presently formulated focuses solely on the policy of promoting competition (*Professional Engineers,* supra), recognition of a municipal public policy "defense" within the framework of the rule of reason would drastically alter the nature of a court's rule of reason inquiry: a court would apparently be called on to balance the "amount" of anticompetitive restraint against a municipality's interest in effectuating a desired local purpose. If the rule of reason were so modified, it would be no more than a means for judges to impose their own policy judgments on municipal actions. (See *Boulder,* 455 U.S. at pp. 67-68, Rehnquist, J., dis.; Civiletti, *The Fallout from Community Communications Co.* v. *City of Boulder: Prospects for a Legislative Solution* (1983) 32 Cath. U.L.Rev. 379, 386-337; Comment, *Alternative Approaches to Municipal Antitrust Liability* (1982) 11 Fordham Urban L.J. 51, 81-82; cf. Marticorena, supra, 9 Western St. U.L.Rev. at pp. 166-167.) We therefore reject a modified rule of reason; instead, we adopt a test that prevents judicial second-guessing of local decisions to accomplish proper local purposes. (see *post,* p. _____*, fn. 28.)

* *Infra* A-31.

[26] Certainly, official misconduct or conflict of interest should not be immune from condemnation under the antitrust laws. See Note, supra, 79 Colum.L.Rev. at page 538; compare, Cirace, supra, 61 Tex.L.Rev. at page 498 (arguing that municipalities should be exempt from antitrust scrutiny if (a) displacement of competition is no broader than the scope of the substantial market failure, imperfection, or instability at which it is directed, and (b) implementation involves no official misconduct, discrimination, or conflict of interest).

We turn for initial guidance to the United States Supreme Court's commerce clause cases. State or local regulation will be upheld against commerce clause attack if the regulation (1) does not discriminate against interstate commerce and (2) bears a rational relationship to a legitimate local purpose. In addition, the extent to which the court will permit burdens on interstate commerce depends on (3) the nature of the local interest, and whether it could be promoted with a lesser impact on interstate activities. Once these elements are satisfied, the court applies a balancing test: a regulation will be upheld unless its incidental burdens on interstate commerce are clearly excessive in relation to the putative local benefits. (E.g., *Edgar* v. *MITE Corp.* (1982) 457 U.S. 624, 643-646 [striking down state business takeover act]; *Kassel* v. *Consolidated Freightways Corp.* (1981) 450 U.S. 662, 671-679 [striking down state truck length statute]; *Minnesota* v. *Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 471-474 [upholding state law banning plastic and nonreturnable milk containers]; *Hughes* v. *Oklahoma* (1979) 441 U.S. 322, 336-338 [striking down state regulation of minnow trade]; *Pike* v. *Bruce Church, Inc.* (1970) 397 U.S. 137, 142 [striking down state law on packaging of cantalopes]; *Dean Milk Co.* v. *City of Madison* (1951) 340 U.S. 349, 353-356 [striking down local milk regulation].)

With appropriate modifications, we believe that a test modeled after the court's commerce clause cases will provide a workable standard for judging alleged conflict between municipal ordinances and the federal antitrust laws. We will, however, depart from the United States Supreme Court's commerce clause test in one significant respect. We will not apply the wide-ranging, essentially standardless cost-benefit analysis employed in the court's recent "balancing" decisions. (See, e.g., *MITE Corp.*, supra, 457 U.S. 624; *Kassel*, supra, 450 U.S. 662; *Clover Leaf Creamery*, supra, 449 U.S. 456; see generally, Eule, *Laying the Dormant Commerce Clause to Rest* (1982) 91 Yale L.J. 425 [criticizing the court's balancing approach, and proposing an alternate standard]; Maltz, *How Much Regulation is too Much—An Examination of Commerce Clause Jurisprudence* (1981) 50 Geo.Wash.L.Rev. 47 [same]; Tushnet, *Rethinking the Dormant Commerce Clause* 1979 Wis.L.Rev. 125 [same].) Balancing a municipality's need for particular local health, safety and welfare regulations or programs against often incommensurable alleged anticompetitive effects is a task for which courts are not well suited. On the other hand, a standard applicable to municipalities must be capable of considering those economic efficiency factors that underlie federal antitrust policy.

Adapting the court's commerce clause test to this facial section 1 attack on a municipal rent control ordinance, we conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power,[27] and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.[28]

Applying this test to the present case, we first observe that our decision in *Birkenfeld* forecloses any suggestion that the

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[27] This formulation would not rest determination of permissible anticompetitive municipal conduct on findings that the local government engaged in "traditional," or "integral" functions, nor would an ordinance's validity turn on the distinction between "governmental" as opposed to "proprietary" activities. Framing permissible conduct in terms of a municipality's exercise of its legitimate police powers, on the other hand, encompasses all local actions rationally related to promotion of local health, safety and welfare. (*Home Rule*, supra, 49 Brooklyn L.Rev. at p. 294, fn. 191.)

[28] We recognize that this standard calls on courts to make difficult determinations as to whether proposed alternative means of accomplishing a legitimate local purpose would do so (1) as effectively as the challenged means and (2) through means that intrude less on the policies of the federal antitrust laws. Regardless the difficulty of these determinations, however, this standard is preferable to a so-called "municipal rule of reason," because it would not require a court to balance competing—and often incommensurable—policies. (See *ante*, p. _____*, fn. 25.) Instead, the standard we embrace today prevents judicial second-guessing of legitimate local purposes. However, although a court may not invalidate local legislation by balancing the propriety of (or need for) a legitimate local purpose against federal antitrust policies, a court may invalidate a municipality's means of achieving a local policy if the local goal is sought to be advanced through discriminatory or irrational means, or if it could be achieved as effectively by means that can be demonstrated to likely intrude less on federal antitrust policies.

* *Infra* A-29.

regulation is not supported by a legitimate purpose. There are no allegations of conflict of interest or illegal collusion in the enactment or drafting of the ordinance. Moreover, "[i]t has long been settled that [municipal police] power extends to objectives in furtherance of the public peace, safety, morals, health and welfare and 'is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life.'" (17 Cal.3d 129, 160.)

Nor can it be suggested at this late date that rent control is not rationally related to the municipality's legitimate exercise of its police power. We observed in *Birkenfeld* that, as in the present case, "[t]he charter amendment includes in its stated purposes for imposing rent control the alleviation of the ill effects of the exploitation of a housing shortage by the charging of exorbitant rents to the detriment of the public health and welfare of the city and particularly its underprivileged groups. [Citation.] The amendment thus states on its face the existence of conditions in the city under which residential rent controls are reasonably related to promotion of the public health and welfare and are therefore within the police power." (Ibid.) Furthermore, *Birkenfeld* very clearly establishes that, even absent a so-called "housing emergency," local regulation of rents for the purposes stated in section 3 of the present ordinance is a rational exercise of the municipality's police power. (Id. at pp. 153-164; *Carson Mobilehome Park Owners' Assn.* v. *City of Carson* (1983) 35 Cal.3d 184, 189, fn. 4.)

Neither can plaintiffs demonstrate that the regulation fails to operate in an even handed manner. The only possible theory of discriminatory treatment of similarly situated landlords concerns section 5, subdivision (f), of the ordinance. When the regulation was passed, this provision exempted "[r]ental units in a residential property which is divided into a maximum of four (4) units where one of such units is occupied by the landlord as his/her principal residence,"[29] but limited the

[29] This subdivision was amended in 1982 to limit the exemption to rental property divided into two units. See *ante*, page _____*, footnote 2.

* *Infra* A-4.

exemption to "rental units that would have been exempt under the provisions of this Ordinance had this Ordinance been in effect on December 31, 1979." Plaintiffs do not challenge the exemption itself; instead, they challenge subdivision (f), to the extent that it excludes from the exemption any property that became owner-occupied after December 31, 1979.

As defendants point out, however, the challenged exclusion from the exemption bears a debatable rational relationship to the purposes of the ordinance. The Berkeley electorate could reasonably have determined that the exclusion was desirable to prevent some landlords from avoiding application of the ordinance by evicting tenants and moving into their rental property after the provisions of the proposed ordinance became known. (See Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade* (1983) 35 Rutgers L.Rev. 723, 758 & fn. 128 [suggesting that in jurisdictions without the exemption limitation, such abuse is widespread].)[30] Because the disparate treatment afforded similarly situated landlords is supported by a debatable rational basis, this aspect of plaintiffs' challenge must also be rejected. (*Clover Leaf Creamery*, supra, 449 U.S. 456, 464; *New Orleans* v. *Dukes* (1976) 427 U.S. 297, 303; *Hale* v. *Morgan* (1978) 22 Cal.3d 388, 395.)

Finally, plaintiffs suggest no alternative, equally effective approach to achieving defendants' legitimate local purposes by means that would have a less intrusive impact on federal antitrust policies. Indeed, such a showing could be made only after extensive evidence has been taken in the trial court. We therefore hold that plaintiffs have failed to establish that the ordinance on its face conflicts with section 1 of the Sherman Act.

[30] Although plaintiffs argue that any landlords so disposed would already have taken such measures because rental propeorty of four or fewer units was already exempt from rent control by the terms of a prior ordinance (the Temporary Rent Stabilization Ordinance, passed by the Berkeley City Council eff. Dec. 30, 1979), this response ignores the fact that the ordinance now in question is far more comprehensive than its recent predecessor.

C. Facial Validity of the Ordinance Under Section 2 of the Sherman Act

Plaintiffs also assert that the ordinance on its face violates section 2 of the Act. That section provides inter alia that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . ." (15 U.S.C. § 2.)

In the context of reviewing the legality of private business conduct, the United States Supreme Court has established that the "offense" of monopolization consists of two elements: (1) possession of "monopoly power" in the relevant market, and (2) willful acquisition of that power. (*United States* v. *Grinnell Corp.* (1966) 384 U.S. 563, 570-571.) "Monopoly power" has been defined as the "power to control prices or exclude competition." (*United States* v. *du Pont Co.* (1956) 351 U.S. 377, 391 & fn. 18.) The existence of such power may be inferred from a defendant's predominant share of the relevant market. (*Grinnel,* supra, 384 U.S. at p. 571 [87 percent of market is monopoly power]; *American Tobacco Co.* v. *United States* (1946) 328 U.S. 781, 797 [two-thirds to 80 percent of market is monopoly power].) Seizing on these principles, plaintiffs claim the ordinance is "obviously" invalid because it represents a willful acquisition of power to control prices of all covered rental units in Berkeley—23,000 of the 27,000 units in that city.

Although plaintiffs' claim would likely have merit if defendants were private business parties and if the restraint was proved to affect interstate commerce, for reasons discussed above we will not mechanically apply to municipal defendants, rules of law fashioned exclusively in the context of private business regulation. Instead, and assuming, over defendants' vehement protestations, that section 2 of the Act applies to a party that is not itself a competitor in the relevant market that it is accused of monopolizing, we apply the test articulated *ante,* at page *.

* *Infra* A-31 to 32.

As explained previously, the stated objectives of the ordinance indicate a legitimate local purpose. Plaintiffs do not contend that the ordinance was implemented through misconduct, conflict of interest, or in order to affect discrimination—all factors that would tend to rebut defendants' claim of a legitimate purpose. (See *Cirace,* supra, 61 Tex.L.Rev. at p. 498.) It is established that the means invoked by defendants' ordinance is a rational exercise of the municipality's police power. Plaintiffs have cited no evidence tending to show that the ordinance fails to regulate similarly situated competitors in a reasonably evenhanded manner. Finally, they suggest no equally effective alternative to accomplish these legitimate local purposes by means that would have a less intrusive impact on federal antitrust policies. We therefore conclude that plaintiffs have failed to establish that the ordinance on its face conflicts with section 2 of the Sherman Act.

Because we determine that plaintiffs have not established a conflict with the Act, we do not address whether the ordinance may be exempt from antitrust scrutiny under *Boulder.* (*Rice* v. *Norman Williams Co.,* supra, 458 U.S. at p. 662, fn. 9.) We proceed to analyze plaintiffs' additional constitutional and statutory contentions.

II.

Rent Control Issues[31]

A. Facial Validity of the Ordinance's "Fair Return" Standard

The primary dispute in the trial court and one of the primary substantive questions posed on this appeal concerns whether a rent control ordinance is facially constitutional if it provides that a landlord is to receive a fair return on his investment rather than a fair return on the value of his property.[32] The parties, assisted by amici curiae on both sides of

[31] As preliminary matter, we reject plaintiffs' procedural claim that it was improper for the court to grant judgment on the pleadings because this denied them the opportunity to present evidence as to their claims of confiscation, denial of equal protection, and unlawful restraint on alienation. On a defense motion for judgment on the pleadings, all facts alleged in the complaint are deemed admitted. (*Sullivan* v. *County of Los Angeles* (1974) 12 Cal.3d 710, 714, fn. 3; *Colberg, Inc.* v. *State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 411-412.) There was no need for plaintiffs to present any evidence. Further, although they claim that judgment on the pleadings denied them a declaration as to facial invalidity, the judgment expressly declared the ordinance "valid on its face." It is well established that a motion for judgment on the pleadings "may be used in an action for declaratory relief to obtain a *declaratory judgment on the merits in favor of the defendant* rather than a dismissal of the plaintiff's suit." (4 Witkin, Cal. Procedure (2d ed. 1971), Proceedings Without Trial, § 161, p. 2817, emphasis in original.) Finally, although plaintiffs claim they should have been granted leave to amend their complaint, any amendment to make further factual allegations would only be applicable to the claim that the ordinance was invalid *as applied.* They were granted leave to amend as to this claim, but later dismissed the amended complaint.

[32] In reality, defendants' ordinance employs two administrative standards for setting maximum rents. As discussed *post* at pages _____-_____*, section 11 provides for annual rent adjustment, but precludes the Board from granting such citywide rent adjustment except to offset certain increases in general costs. This is, in essence, a variation on the so-called "maintenance of net operating income," or "cost passthrough" approach. (See *Baar, supra,* 35 Rutgers L.Rev. at pp. 809-816.) Section 12, subdivision (c), on the other hand, provides for individual rent increases based on "all relevant factors, including (but not limited to): .... (8) the landlord's rate of return on investment," as well as the landlord's costs.

* *Infra* A-47 to 49.

the issue, have vigorously briefed and argued their respective views. We must stress at the outset, however, the limited scope of our inquiry in facial challenges such as this. As we made clear in *Birkenfeld,* whether rental regulations are fair or confiscatory depends ultimately on the result reached. (17 Cal.3d 129, 165.) That determination, of course, can only be made by analyzing a challenge to the regulation as applied. Nevertheless, we will declare a regulation invalid on its face "when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties." (Id. at p. 165; see also *Cotati Alliance for Better Housing* v. *City of Cotati* (1983) 148 Cal.App.3d 280, 287, 291; *Hutton Park Gardens* v. *Town Council* (N.J. 1975) 350 A.2d 1, 14-16.)

For more than a decade, rent control agencies throughout this state and the nation have employed a veritable smorgasbord of administrative standards by which to determine rent ceilings. (*Carson,* supra, 35 Cal.3d 184, 188 ["just, fair and reasonable"]; *Cotati Alliance,* supra, 148 Cal.App.3d at p. 286 ["fair and reasonable return on investment"]; *Palos Verdes Shores Mobile Estates, Ltd.* v. *City of Los Angeles* (1983) 142 Cal.App.3d 362, 371 ["just and reasonable return" based on the "maintenance of profit" approach]; *Gregory* v. *City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 86 [interpreting "return on investment" as requiring a "just and reasonable return on the fair market value of [landlords'] property"]; see also Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade* (1983) 35 Rutgers L.Rev. 723, 781-817 [describing and analyzing the following standards: (1) cash flow/return on gross rent; (2) return on equity (investment); (3) return on value; (4) percentage net operating income; and (5) maintenance of net operating income]; Comment, *Rethinking Rent Control: An Analysis of "Fair Return"* (1981) 12 Rutgers L.J. 617, 640-648 [hereinafter cited *Fair Return*]; Comment, *Rent Control and Landlords' Property Rights: The Reasonable Return Doctrine Revived* (1980) 33 Rutgers I. 165 [hereinafter cited *Reasonable Return Doctrine*].) As we recently stressed in *Carson,* "[r]ent control agencies are not obliged by either the state or federal Constitution to fix rents by

application of any particular method or formula." (35 Cal.3d at p. 191, citing *Power Comm'n* v. *Pipeline Co.* (1942) 315 U.S. 575, 586; *Power Comm'n* v. *Hope Gas Co.* (1944) 320 U.S. 591, 601-602.)

In view of this oft-quoted and oft-followed principle, we are not persuaded by plaintiffs' and amici's apparent contention that the much criticized return on value standard[33]—or any of

[33] Whereas the return on investment standard determines "just and reasonable return" by focusing on the landlord's investment, the return on value standard determines fair return by focusing on the market value of the landlord's property. The fair return on market value standard advocated by plaintiffs and amici was used by the United States Supreme Court in an early railroad rate case, *Smyth* v. *Ames* (1898) 169 U.S. 466, decree mod., 171 U.S. 361, in which the court held that railroads were entitled to rates sufficient, after deducting reasonable operating expenses, to produce a fair return on the fair market value of their assets. (169 U.S. at p. 547.) The Supreme Court later changed its position, and approved use of an approach designed to ensure a fair return on investment. (*Hope Gas*, supra, 320 U.S. at pp. 599-605; see Siegel, *Understanding the Lochner Era: Lessons From the Controversy Over Railroad and Utility Rate Regulation* (1984) 70 Vir.L.Rev. 187, 215-259.) Rejecting the idea that rates set by the Federal Power Commission must be based on the present "fair value" of property, the Hope Gas court observed: "[t]he heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated." (Id. at p. 601.) Implicit in this statement is the suggestion that a return on fair value standard is circular and unworkable. "Value" is the current worth of future benefits that may be derived from an investment. The "value" of a utility company, for example, depends in part on the rates that the utility company may charge for its product. Thus, to set rates by reference to the company's "value" is a circular process. (*Siegel*, supra, 70 Vir.L.Rev. at p. 246 & fn. 253.)

The same circularity problem exists when fair market value concepts are applied in the rent control context. (See *Helmsley* v. *Borough of Fort Lee* (N.J. 1978) 394 A.2d 65, 71-72; *Baar;* supra, 35 Rutgers L.Rev. at pp. 798-803; *Reasonable Return Doctrine*, supra, 33 Rutgers L.Rev.) "Value is an expression of a building's potential capacity to generate rental income and incidental or intangible benefits of ownership during its useful life." (*Fair Return*, supra, 12 Rutgers L.J. at p. 640.) The current "value" of a rental property thus depends in large part on the amount of rental income the property is expected to generate. As in the utility rate cases, the process of using value to determine what rental income shall be permitted becomes circular. (Accord, *Cotati Alliance*, supra, 148 Cal.App.3d 280, 287-289; *Palos Verdes Estates*, supra, 142 Cal.App.3d 362, 370-371.) The *Cotati Alliance* court thus rejected a landlord's claim that a return on value standard is mandated for an ordinance to be facially constitutional: "The fatal flaw in the return on value standard is that income property most commonly is valued through capitalization of its income. Thus, the process of making individual

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its variations[34]—is required to be employed by the Board in the present case. We reiterate that selection of an administrative standard by which to set rent ceilings is a task for local governments—in this case the voters themselves—and not the courts. Our only concern in this appeal is whether defendants' fair return on investment standard, on its face, will not permit those who administer it to avoid confiscatory results.[35] (*Birkenfeld*, supra, 17 Cal.3d at p. 165; *Power Comm'n* v. *Pipeline Co.*, supra, 315 U.S. at pp. 585-586; *Hutton Park*, supra, 350 A.2d at

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rent adjustments on the basis of a return on value standard is meaningless because it is inevitably circular: value is determined by rental income, the amount of which is in turn set according to value. Use of a return on value standard would throughly undermine rent control, since the use of uncontrolled income potential to determine value would result in the same rents as those which would be charged in the absence of regulation. Value (and hence rents) would increase in a never-ending spiral." (148 Cal.App.3d at p. 287; accord, *Helmsley* supra, 394 A.2d at pp. 71-72; *Niles* v. *Boston Rent Control Administrator* (Mass. App. 1978) 374 N.E.2d 296, 300-303.)

[34] Amicus for plaintiffs suggests adoption of the "public utility investment standard," which, it is urged, would result in a base rent commensurate with the value of the regulated property at the time rent controls were imposed. (Cf. Southern California Gas Co. v. *Public Utilities Com.* (1979) 23 Cal.3d 470, 474.) Aside from the questionable propriety of applying public utility law to the very different area of local regulation of private economic transactions, it has been observed that "if there was a housing shortage which caused rents to be artifically high, use of prerent control value as the measure [for calculating fair return] will perpetuate artificially inflated rents. Rent control utilizing this standard is no rent control at all." (*Cotati Alliance*, supra, 148 Cal.App.3d 280, 287.)

[35] As is apparently conceded by both parties, it would be premature and problematic for us to attempt to articulate, in the context of this facial attack, the constitutional test against which specific applications of various administrative standards are to be judged. We will face that question when we review a challenge to rent control as applied to particular plaintiffs. It is sufficient in this case to measure defendants' fair return on investment standard against the general proposition that an administrative standard must be such that it will permit those who administer it to avoid confiscatory results.

On a similar point, we also wish to dispel suggestions based on dictum in *Birkenfeld* that we have previously established, as a constitutional test, a requirement that rent controls must provide landlords a "just and reasonable return on their property." (17 Cal.3d at p. 165.) This statement was made in the context of a broader discussion of the legitimate exercise of local police power, and was most certainly not intended to articulate a constitutional standard. *Birkenfeld's* reference to the term "property" should therefore be viewed with caution; it would be inappropriate to suggest that the *Birkenfeld* statement can be used to predict the specific constitutional standard that we will articulate when we review a challenge to rent control as applied.

pp. 13-16.) If we conclude that the fair return on investment standard affords the Board sufficient flexibility to avoid confiscatory results, we must uphold the ordinance. (*Cotati Alliance,* supra, 148 Cal.App.3d at pp. 289-291.)

Plaintiffs and amici posit a number of due process obstacles and practical difficulties that the Board may face in administering the return on investment standard, but none will prevent the Board from avoiding confiscatory results.

1. *Adjustment of Landlords' Frozen May 1980 Profit Amount, and Consideration of the Effect of Inflation.* One of plaintiff's primary complaints is that section 11 of the ordinance locks landlords into the fixed dollar amount of profit they earned in May 1980,[36] and that in order for the board to avoid confining those landlords who invested long ago with pre-inflation dollars to their May 1980 profit amount, it must be free under section 12 of the ordinance to take into consideration the effect of inflation on individual landlords' investments[37] and award fair returns based on "adjusted" investment figures.[38]

[36] Plaintiffs demonstrate this point by the following hypothetical: In May of 1980, a landlord's gross rental income is $10,000; his operating expenses total $9,000, as follows: mortgage payment of $6,000; property taxes of $1,000; utility bills of $2,000. Thus his net return (profit) is $1,000. In May of 1982 his expenses remain the same except that utility costs increase by $500 to $1,500, thereby reducing his net return to $500. Under these circumstances the section 11 annual general adjustment mechanism allows the Board to provide for a 5 percent increase in rent, to $10,500, so that the landlord's profit amount would be the same number of dollars ($1,000) as it was two years earlier. However, no relief is or can be provided under section 11 for the erosionary effect of two years of inflation on the $1,000 base income, the purchasing power of which has been diminished.

[37] The "effect of inflation" issue was apparently raised for the first time at oral argument in the Court of Appeal. On July 21, 1983, the appellate court vacated submission of the case in order to receive defendants' written concession of July 5, 1983, that the term "fair return on investment" in section 12, subdivisions (c) and (i), may reasonably be interpreted to permit the Board to consider and allow for any decrease in the purchasing power of the landlord's return caused by inflation. Both the court's order and defendants' letter, as well as plaintiffs' response thereto, are part of the record before us on appeal. The issue has been briefed and responses have been filed.

[38] Plaintiffs' point can best be explained by a hypothetical example. Assuming that the Board were to fix a "fair return on investment" at 10 percent for all landlords, the following might occur: Recent investor A has invested $70,000 since 1979, and he earned a profit of $6,000 in 1980. In 1984 he petitions the Board under section 12 for an increase in his return on

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Clearly, if the fixed amount of a landlord's profit remains the same year after year his return will in time diminish in real value: it is obvious that a $1,000 "profit" in 1990 will have a much lower value than the same dollar amount of profit in 1980. Furthermore, although a fixed profit amount may produce a reasonable or fair return on investment for low-risk investments such as bonds, we must agree with plaintiffs that investment in rental units contemplates a higher risk and hence, in times of high inflation and when viewed in the long term, demands more than mere maintenance of an existing profit amount. (*Cotati Alliance,* supra, 148 Cal.App.3d at p. 295; *Hutton Park Gardens* v. *Town Council* (N.J. 1975) 350 A.2d 1, 15 [a just and reasonable return on investment is one that is generally commensurate with returns on investments in other enterprises having comparable risks].) Therefore, although defendants' ordinance may properly *restrict* landlords' profits on their rental investments, it may not indefinitely *freeze* the dollar amount of those profits without eventually causing confiscatory results. (*Cotati Alliance,* supra, at p. 293 ["If the net operating profit of a landlord continues to be the identical number of dollars, there is in time a real diminution to the landlord which eventually becomes confiscatory."].)

In determining the facial validity of the ordinance against plaintiffs' claim that it must be interpreted to require the Board to account for the effect of inflation on investment in determining a landlord's amount of profit or return, we adhere to the

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investment. Under its 10 percent return on investment standard, the Board may grant A an increase of $1,000, so that his 1984 amount of profit is $7,000. Additional contributions to capital could, of course, also yield a 10 percent return.

In contrast, long-term investor B has invested $40,000 since 1950, and he, too, earned a profit of $6,000 in 1980. However, when in 1984 he petitions the Board under section 12 for an increase in his return on investment, he will be turned down if the Board mechanically multiplies his $40,000 investment by a 10 percent return. Hence, B would be limited to his frozen May 1980 amount of return—$6,000. Only if (as plaintiffs suggest is mandatory) the Board takes into account the effect of inflation on his investment, and "adjusts" his investment figure accordingly, or if (as §12, subd. (c)(8), seems to allow (see *post,* p. ___*, fn. 39)) the Board assigns him a higher rate of return, may he secure an increase in the amount of profit he received in 1980.

* *Infra* A-42.

rule earlier stressed, that whether a regulation produces a return that is confiscatory or fair depends ultimately on the result, and that we will invalidate an ordinance on its face only if its terms preclude avoidance of confiscatory results.

First, it is not apparent that the ordinance on its face precludes alternative means of adjusting landlords' frozen May 1980 profit amounts.[39] Moreover, even assuming arguendo that a confiscatory result might occur in a future individual case if the Board fails to invoke measures necessary to adjust the dollar amount of a landlord's May 1980 profit, this would still provide us no basis on which to invalidate the entire ordinance, or its administrative "fair return on investment" standard. Unlike *Birkenfeld,* in which we determined that inherent and unnecesary procedural defects inevitably deprived all landlords of due process "except perhaps for a lucky few" (17 Cal.3d at p. 172), in this case, by contrast, it is unknown what percentage of landlords might be able to prove unconstitutional confiscation if the Board fails to consider the effect of inflation on dollars invested in order to adjust a landlord's frozen profit amount. Nor do we have before us any evidence to suggest that when faced with such a prospect, the Board will decline to invoke measures within its powers to adjust individual profit amounts. In this regard we observe that "[i]t is to be presumed that the board will exercise its powers in conformity with the requirements of the Constitution; and if it does act unfairly, the fault lies with the board and not the statute." (*Butterworth* v. *Boyd* (1938) 12 Cal.2d 140, 149.) Until we are required to review a specific challenge to the Board's application of the ordinance, we note simply that, as defendants themselves concede (*ante,* p. *, fn. 37), the ordinance is not drawn so narrowly as to preclude consideration of the effect of inflation

[39] For example, nothing in the ordinance precludes the Board from adjusting the rate (percentage) of return on investment in order to increase a landlord's amount of profit. Indeed, the ordinance seems to contemplate ad hoc adjustment of individual landlord's rates of return in order to reach this result: section 12, subdivision (c)(8), provides that in making individual adjustments the Board shall consider "[t]he landlord's *rate* of return on investment." (Emphasis added.) See section 12, subdivision (c), set out *post,* page **, footnote 46.

* *Infra* A-40.

** *Infra* A-49.

on a landlord's investment in those cases in which the Board might deem it necessary to take that factor into account in order to avoid causing a confiscatory result.[40]

2. *Irrational Discrimination.* Plaintiffs also argue that the investment standard denies equal protection because it will result in different rent ceilings for comparably valued rental units. This issue was raised and properly decided in *Cotati Alliance,* in which the court observed that such disparate treatment bears a debatable rational relationship to a legitimate public purpose: the voters could have reasonably concluded that the investment standard, more effectively than a value-based standard, ensures noninflated, reasonable rents for citizens in times of high inflation. (*Cotati Alliance,* supra, 148 Cal.App.3d 280, 292; see *Hale* v. *Morgan* (1978) 22 Cal.3d 388, 395.)

3. *Ascertaining the Extent of a Landlord's "Investment".* Plaintiffs next predict problems applying the investment standard to landlords who, for various reasons, have made little or no cash investment. However, those who purchased with no down payment, improved property years ago with "preinflation dollars," or who obtained property through gift or inheritance, need not be deprived of a fair return simply because they made no initial monetary investment. The ordinance does not confine "investment" to such a restrictive definition. The Board, therefore, is not precluded, in appropriate cases, from considering as "investment," a landlord's personal labor in improving his property. (*Cotati Alliance,* supra, 148 Cal.App.3d at pp.

[40] Nothing in the ordinance requires the Board to fix a landlord's return based only on his "actual" investment. Further, although section 12, subdivision (c), contains a list of "relevant factors" to be considered by the Board in determining the appropriate amount of a landlord's rents, these factors are expressly nonexclusive. And perhaps most significant, subsection (8) of subdivision (c), permits the Board to consider "all relevant factors" in determining the "landlord's rate of return on investment." See section 12, subdivision (c), set out *post* at page ___*, footnote 46.

* *Infra* A-49.

We read *Cotati Alliance* to be consistent with our determination today. That case merely suggests that a rent board *"may"* consider the effect of inflation if doing so is necessary to assure a landlord a fair return, and hence avoid a confiscatory result, in a specific case. (148 Cal.App.3d at p. 289.)

387, 289.) Nor is the Board precluded from imputing the transferor's "investment," adjusted as might be necessary, to landlords who obtained property by gift or inheritance. (Ibid.; *Fair Return,* supra, 12 Rutgers L.J. at p. 645.) Furthermore, the ordinance does not preclude the Board from considering "forms of investment such as mortgage payments toward principal, [or] cash invested in later improvements in the property" (*Cotati Alliance*, 148 Cal.App.3d at p. 287), or, with certain exceptions,[41] the terms of a landlord's individual financing obligations. In fact, the ordinance directly provides for such flexible application of the investment standard. Subdivision (i) of section 12 provides that "[no]o provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment."

4. *Deprivation of Full Long-Term Appreciation.* Finally, amicus for plaintiffs appears to argue that the ordinance's investment standard is unconstitutional on its face because it unfairly deprives landlords of full long-term appreciation on the value of their regulated property. The thrust of this contention is apparently aimed at establishing that, as a matter of due process, rent control ordinances must guarantee all landlords a fair return on the full market value of their property. This issue was also raised in *Cotati Alliance*, in which the court observed that "[s]ome lessening of appreciation is a necessary consequence of any rent control, since future appreciation is to a significant extent a function of increased rental income. [Citation.] It is one of the very sources of long-term appreciation—inflated rents—that rent control measures are intended to restrict." (148 Cal.App.3d at p.290.)[42]

The fallacy of plaintiffs' contention is readily apparent. Any price-setting regulation, like most other police power regulations of property rights, has the inevitable effect of

[41] See section 12, subdivisions (d) and (e), set out *post,* page —*. footnote 53.

* *Infra* A-52.

[42] The Court further noted: "[l]andlords also argue that the ordinance unfairly denies long-time landlords any appreciation from the time of acquisition to the date when rents were first controlled, but the ordinance did not *reduce* rents when it was enacted, and thus, did not affect preordinance appreciation." (Id. at pp. 290-291 (emphasis in original).)

reducing the value of regulated properties. But it has long been held that such reduction in property value does not by itself render a regulation unconstitutional. Police power legislation results in a confiscatory "taking" only when the owner has been deprived of substantially all reasonable use of the property. (*Agins* v. *City of Tiburon* (1979) 24 Cal.3d 266, 277, affd. (1980) 447 U.S. 255.) Even a significant diminution in value is insufficient to establish a confiscatory taking. (*Euclid* v. *Ambler Realty Co.* (1926) 272 U.S. 365 [75 percent reduction in value because of zoning law insufficient to establish a taking]; *Hadacheck* v. *Sebastian* (1915) 239 U.S. 394 [nearly 90 percent reduction in value because of use restriction insufficient to establish a taking].) As the United States Supreme Court noted in *Hope Gas Co.,* supra, 320 U.S. at page 601, "[t]he fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid." (Accord, *Penn. Central Transp. Co.* v. *New York City* (1978) 438 U.S. 104, 131 [diminution in property value, standing alone, cannot establish a "taking"]; Permian Basin Area Rate Cases (1968) 390 U.S. 747, 769 ["No constitutional objection arises from the imposition of maximum prices merely because . . . the value of regulated property is reduced as a consequence of regulation."].)

Thus, although we need not articulate in this facial attack the precise constitutional standard that all administrative rent control standards must meet (*ante,* p. *, fn. 35), we can state with certainty that a rent control ordinance need not provide for a fair return on the value of a landlord's property in order to survive a facial challenge. We conclude that defendants' fair return on investment standard will not preclude the Board from avoiding confiscatory results, and hence the administrative standard established in the ordinance is constitutionally valid n its face. (Cal.Const., art. I, § 7; accord, *Oceanside Mobilehome Park Owners' Assn.* v. *City of Oceanside* (1984) 157 Cal.App.3d 887, 897-900; *Cotati Alliance,* supra, 148 Cal.App.3d at pp. 288-289, and cases and authorities cited.)[43]

[43] To the extent it is contrary to this determination, *Gregory* v. *City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 85-86 is disapproved.

* *Infra* A-39.

B. Facial Validity of the Ordinance's Rent Adjustment Procedures

As we observed recently in *Carson,* "[when] rent ceilings of an indefinite duration are established, a mechanism must be provided for granting those increases necessary to permit landlords a just and reasonable return. 'The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary.' " (35 Cal.3d at p. 191, quoting *Birkenfeld,* supra, 17 Cal.3d at p. 169.) As plaintiffs observe, "[p]roperty may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them . . ." (*Smith* v. *Illinois Bell Tel. Co.* (1926) 270 U.S. 587, 591.)

Of course, some delays are inherent in any rent control scheme. But, "only those delays which are longer than practically necessary to achieve the legitimate purposes of the legislation are constitutionally proscribed." (*Carson,* supra, 35 Cal.3d at p. 192; *Birkenfeld,* supra, 17 Cal.3d at pp. 169, 173.)

The test used to review the facial validity of defendants' adjustment procedures is the same one used above to review the ordinances' administrative standard for individual maximum rent adjustments under section 12. We will declare the adjustment procedures invalid only if the ordinance on its face will not permit the Board to avoid confiscatory results. Although in *Birkenfeld* we found Berkeley's former ordinance facially unconstitutional on this basis because, by its terms, it precluded reasonably prompt action in most cases, the ordinance before us now contains none of the problems found in the former regulation.

The prior ordinance had no provision for "general rental adjustments for all or any class of rental units based on generally applicable factors such as property taxes." (*Birkenfeld,* 17 Cal.3d at p. 171) Although we recently recognized in *Carson* that a rent control ordinance need not have a general adjustment provision to pass constitutional muster (35 Cal.3d at p. 194), such a mechanism will be required when the

"magnitude of the job to be done" (*Birkenfeld,* at p. 169) so demands. Since we decided *Birkenfeld* the number of rental units in Berkeley subject to rent control has increased to 23,000. However, the exact mechanism found wanting in 1976 is present in the ordinance before us now in section 11[44]—a

[44] Section 11, as amended in 1982 (see *ante,* p. _____*, fn. 2), provides in full (deletions are stricken with a horizontal line; additions are in italics):

"a. Once each year, the Board shall consider setting and adjusting the rent ceiling for all rental units covered by this Ordinance in general and/or particular categories of rental units covered by this Ordinance deemed appropriate by the Board. The Board shall hold at least two public hearings prior to making any annual general adjustment of the rent ceilings. ~~The first such public hearing shall be conducted no later than October 31, 1980, and the first annual general adjustment shall be made no later than December 31, 1980.~~ *The Board shall publish and publicize notices of the date, time, and place of the public hearings at least thirty (30) days prior to the hearing date. The two required public hearings shall be conducted and the annual general adjustment shall be set between September 1 and October 31, of each year. The annual adjustment shall become effective the following January 1.*

"b. In making annual general adjustments of the rent ceiling, the Board shall:

"(1) Adjust the rent ceiling upward by granting those landlords who pay for utilities a utility adjustment for increases in the City of Berkeley for utilities.

"(2) Adjust the rent ceiling upward by granting landlords a property tax, maintenance and operating expense increase adjustment (exclusive of utilities) for increases in the City of Berkeley for property taxes and maintenance and operating expenses.

"(3) Adjust the rent ceiling downward by requiring landlords to decrease rents for any decreases in the City of Berkeley for property taxes.

"(4) *Adjust the rent ceiling downward by requiring landlords who pay for utilities to decrease rents for any decreases in the City of Berkeley for utilities.*

"In adjusting rents *ceilings* under this subsection, the Board shall adopt a formula or formulas of general application. This formula will be based upon ~~a survey of~~ *the annual rent registration forms, surveys, information and testimonies presented at public hearings, and* other available data indicating increases or decreases in the expenses *relating to the rental housing market* in the City of Berkeley set forth in this subsection. For maintenance and operating expense adjustments, the Board may also use survey data from surrounding communities where appropriate. The Board shall make no more than one annual adjustment of rent ceilings per rental units per year.

"*Adoption of a formula greater than forty-five percent (45%) of the increase in the Consumer Price Index for the twelve months ending the previous June 30 shall require the affirmative vote of six (6) Commissioners, other provisions notwithstanding. Adoption of such a formula shall be a specific and special exception to the requirement of only five (5) affirmative votes to make a decision. For the purposes of this subsection, the Consumer Price Index shall*

* *Infra* A-4.

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comprehensive scheme that provides for annual[45] across the board adjustment based on "cost" factors.

The adjustment for all landlords under section 11 is designed to allow landlords to retain the generally same dollar amount of profit in subsequent years that they received in May

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mean the Consumer Price Index for all urban consumers in San Francisco—Oakland, all items (1967 equals 100), as reported by the Bureau of Labor Statistics of the U.S. Department of Labor, as it pertains to the City of Berkeley.

"c. An upward general adjustment in rent ceilings does not automatically provide for a rent increase. Allowable rent increases pursuant to a general upward adjustment shall become effective only after the landlord gives the tenant at least a thirty (30) days written notice of such rent increase and the notice period expires.

"d. If the Board makes a downward general adjustment in the rent ceilings, landlords of rental units to which this adjustment applies shall give tenants of such rental units written notice of the rent decrease to which they are entitled. Such rent decreases shall take effect not later than thirty (30) days after the effective date set by the Board for the downward general adjustment.

"e. If the maximum allowable rent specified under this Ordinance for a rental unit is greater than the rent specified for such unit in the rental agreement, the lower rent specified in the rental agreement shall be the maximum allowable rent until the rental agreement expires. If the maximum allowable rent specified under this Ordinance for a rental unit is less than the rent specified for such unit in the rental agreement, the lower rent specified under this Ordinance shall be the maximum allowable rent.

"f. No rent increase pursuant to an upward general adjustment of a rent ceiling shall be effective if the landlord:

"(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and/or orders or regulations issued thereunder, or

"(2) Has failed to bring the rental unit into compliance with the implied warranty of habitability, *or*

"(3) *Has failed to make repairs as ordered by the Housing Inspection Services of the City of Berkeley, or*

"(4) *Has failed to completely register by September 1, except as provided in Subsection 11.g. below.*

"g. The amount of an upward general adjustment for which a landlord shall be eligible shall decrease by ten (10) percent per month for each month beyond December 1 for which the landlord fails to register.

"h. A landlord who is ineligible to raise rents under an upward general adjustment for an entire calendar year shall not be eligible to raise rents under that particular general adjustment in future years."

[45] We are informed by amicus that general adjustments under section 11 in the past four years have been as follows: 1981, 5 percent (6.21 if the landlord provided space heating); 1982, 9 percent; 1983, 5 percent; 1984, no increase (apparently because of the low inflation rate for 1983). See *Baar*, supra, 35 Rutgers L.Rev. at pages 779-780.

1980. In order to acquire rent increases that reflect cost increases not imposed on other landlords generally, or in order to seek an increase in dollar amount of return (i.e., the dollar amount of profit), a landlord must secure an individual adjustment pursuant to section 12, subdivision (c).[46] And, as observed *ante* at pages - *, unless landlords have reasonable access to such individual adjustments, the ordinance has the potential for producing unconstitutional results.

[46] Section 12, subdivision (c), provides in full:

"In making individual adjustments of the rent ceiling, the Board or the hearing examiner shall consider the purposes of this Ordinance and shall specifically consider all relevant factors, including (but not limited to):

"(1) Increases or decreases in property taxes;

"(2) Unavoidable increases or any decreases in maintenance and operating expenses;

"(3) The cost of planned or completed capital improvements to the rental unit (as distinguished from ordinary repair, replacement and maintenance) where such capital improvements are necessary to bring the property into compliance or maintain compliance with applicable local code requirements affecting health and safety, and where such capital improvement costs are properly amortized over the life of the improvement;

"(4) Increases or decreases in the number of tenants occupying the rental unit, living space, furniture, furnishings, equipment, or other housing services provided, or occupancy rules;

"(5) Substantial deterioration of the controlled rental unit other than as a result of normal wear and tear;

"(6) Failure on the part of the landlord to provide adequate housing services, or to comply substantially with applicable state rental housing laws, local housing, health and safety codes, or the rental agreement;

"(7) The pattern of recent rent increases or decreases;

"(8) The landlord's rate of return on investment. In determining such return, all relevant factors, including but not limited to the following shall be considered: the landlord's actual cash down payment, method of financing the property, and any federal or state tax benefits accruing to landlord as a result of ownership of the property;

"(9) Whether or not the property was acquired or is held as a long-term or short-term investment; and

"(10) Whether or not the landlord has received rent in violation of the terms of this Ordinance or has otherwise failed to comply with the Ordinance.

"It is the intent of this Ordinance that individual upward adjustments in the rent ceilings on units be made only when the landlord demonstrates that such adjustments are necessary to provide the landlord with a fair return on investment."

* *Infra* A-40 to 43.

In comparison to the procedures for individual adjustment in Berkeley's former regulation—which, we said, "put the Board in a procedural strait jacket" (*Birkenfeld,* supra, 17 Cal.3d at p. 171)—the ordinance before us now is solicitous of due process. The initiative drafters apparently studied *Birkenfeld,* and took it to heart: every major procedural failing that we noted in the former ordinance has been addressed, and additional procedural protections not previously mentioned have been included.

The previous Berkeley ordinance found invalid in *Birkenfeld* (1) did not allow a landlord to file a petition for rent adjustment unless it was accompanied by a certificate of building code compliance from the city's building code department; (2) gave the Board no power to consolidate petitions for units in the same building, unless the tenants consented; and (3) gave the Board (five members each paid a maximum of $2,400 per year) no power to delegate the holding of hearings to hearing officers, or even to members or panels of the Board. (17 Cal.3d at pp. 170-171.) As defendants point out, none of these "defects" appear in the new ordinance: (1) there is no requirement that a landlord's petition be accompanied by a certificate from the building department, or from anyone else;[47] (2) the Board is expressly given the power to consolidate a landlord's petitions for units in the same building—whether or not the tenants consent;[48] and (3) the ordinance expressly gives the Board the power to appoint hearing officers to hold

[47] Section 12, subdivision (a) provides in full: "Petitions. Upon receipt of a petition by a landlord and/or tenant, the rent ceiling of individual controlled rental units may be adjusted upward or downward in accordance with the procedures set forth elsewhere in this Section. The petition shall be on the form provided by the Board. The Board may set a reasonable per unit fee based upon the expenses of processing the petition to be paid by the petitioner at the time of filing. No petition shall be filed before September 1, 1980. Notwithstanding any other provision of this Section, the Board or hearing examiner may refuse to hold a hearing and/or grant an individual rent ceiling adjustment for a rental unit if an individual hearing has been held and decision made with regard to the rent ceiling for such unit within the previous six months."

[48] Section 12, subdivision (b)(9) provides in full: "Consolidation. All landlord petitions pertaining to tenants in the same building shall be consolidated for hearing, and all petitions filed by tenants occupying the same building shall be consolidated for hearing unless there is a showing of good cause not to consolidate such petitions."

hearings,[49] and the hearing officers are authorized to issue decisions that are final unless appealed to the Board.[50] Additionally, the new ordinance imposes a time limit of 120 days on all decisions on landlord petitions.[51]

Defendants' new ordinance clearly avoids the confiscatory delays inherent in the former regulation's unit-by-unit procedure. It provides for general citywide increases to cover common costs, and its individual adjustment procedures are designed to assure reasonably prompt consideration of landlords' claims.[52] These procedures are reasonably related to

[49] Section 12, subdivision (b)(1) provides in full: "Hearing Examiner. A hearing examiner appointed by the Board shall conduct a hearing to act upon the petition for individual adjustments of rent ceilings and shall have the power to administer oaths and affirmations."

[50] Section 12, subdivision (b)(11) provides in full: "Finality of Decision. The decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal; however, in the event that the Board or panel reverses or modifies the decision of the hearing examiner, the Board shall order the appropriate party to make retroactive payments to restore the parties to the position they would have occupied had the hearing examiner's decision been the same as that of the Board's."

[51] Section 12, subdivision (b)(12) provides in full: "Time for Decision. The rules and regulations adopted by the Board shall provide for final Board action on any individual rent adjustment petition within one hundred and twenty (120) days following the date of filing of the individual rent ceiling adjustment petition, unless the conduct of the petitioner or other good cause is responsible for the delay." As defendants point out, it is clear that the 120-day rule also applies to petition determinations that are appealed to the Board.

[52] Like the 105-day provision that we recently reviewed in *Carson,* we do not believe that the time allowed for review under section 12 is excessive. Within the 120-day time limit, "the Board must (1) review all information provided by the applicants, including complex financial and tax data, (2) review comments received from tenants, and (3) hold a hearing at which the interested parties are permitted to testify. [¶] Careful review of the information provided to the Board is important. The financial and tax data submitted by the applicant reveals whether the owner's profits have increased or decreased, whether the property taxes or operating costs associated with the [property] have increased or decreased, and whether any capital improvements have been made. Review of the information supplied by the tenants helps the Board determine whether there has been any increase or decrease in the services provided by the [landlord]." (35 Cal.3d at pp. 193-194.)

We stress that only the facial validity of the ordinance is currently before the court. Whether individual landlords might prove a denial of due process because of delays exceeding the 120-day time limit is a question of great concern, but it is not before us at this time.

achievement of the ordinance's stated purpose of, inter alia, preventing excessive rents. By its own terms, the ordinance will permit the Board to avoid confiscatory results; we therefore conclude that the ordinance, on its face, guarantees plaintiffs due process. (Cal.Const., art I, § 7; *Birkenfeld,* supra, 17 Cal.3d at pp. 165, 173.)

C. Unreasonable Restraint on Alienation

At the same time that mechanical application of the fair return on investment standard may have the potential to produce confiscatory results in some individual cases (*ante,* pp. - *) it is also recognized that the standard has the potential for awarding windfall returns to recent investors whose purchase prices and interest rates are high. If this latter aspect were unregulated, use of the investment standard might defeat the purpose of rent price regulation. To prevent this result, defendants' ordinance, like others in the state (see *Baar,* supra, 35 Rutgers L.Rev. at p. 788, fn. 249), contains two "antispeculation" clauses that prohibit the Board from considering certain increases in mortgage interest payments when those increases occur after adoption of the ordinance. (Id. at pp. 788, 792.) Thus, except when refinancing is necessary to make capital improvements or in cases of individual hardship to buyers, section 12, subdivisions (d) and (e),[53] preclude the Board from

* *Infra* A-40 to 43.

[53] These subdivisions provide in full: "d. No individual upward adjustment of a rent ceiling shall be authorized by the Board by reason of increased interest or other expenses resulting from the landlord's refinancing the rental unit if, at the time the landlord refinanced, the landlord could reasonably have foreseen that such increased expenses could not be covered by the rent schedule then in existence, except where such refinancing is necessary for the landlord to make capital improvements which meet the criteria set forth in Section 12.c.(3). This paragraph shall only apply to that portion of the increased expenses resulting from the refinancing that were reasonably foreseeable at the time of the refinancing of the rental unit and shall only apply to rental units refinanced after the date of adoption of this Ordinance. [¶] e. Except for cases of individual hardship as set forth in Subsection 12.i. of this Ordinance, no individual upward adjustment of a rent ceiling shall be authorized by the Board because of the landlord's increased interest or other expenses resulting from the sale of the property, if at the time the landlord acquired the property, the landlord could have reasonably foreseen that such increased expenses would not be covered by the rent schedule then in effect. This Subsection (12.e.) shall only apply to rental units acquired after the date of adoption of this Ordinance."

authorizing an individual rent increase because of increased interest or other expenses resulting from sale or refinancing of rental property, if the landlord could reasonably have foreseen that such increased expenses could not be covered by the "existing" rent schedule.

Plaintiffs do not challenge the constitutional reasonableness of the classification created by these restrictions; instead, they claim these provisions constitute unreasonable restraints on alienation in that they will inhibit sales of rental property at a fair market value in violation of Civil Code section 711. That section states simply, "[c]onditions restraining alienation, when repugnant to the interest created, are void." Plaintiffs' contention, however, ignores ordinance section 12, subdivision (i), which cautions, "[n]o provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment." This safety valve overrides all other provisions of the ordinance and averts any danger that subdivisions (d) and (e) might prevent a purchaser from realizing a fair return, and thus prevents any unreasonable restraint on alienation. (See generally *Wellenkamp* v. *Bank of America* (1978) 21 Cal.3d 943, 948.)

Furthermore, even if the two subdivisions were assumed to create an unreasonable restraint, we are persuaded by defendants' contention that Civil Code section 711 does not, and was never intended to, apply to municipal ordinances. Our review of that statute and the many cases that apply it reveals that it addresses only private restraints on alienation, and not government regulations. (Cf. 3 Witkin, Summary of Cal. Law (8th ed. 1973) Real Property, § 314, p. 2024 [the rule against restraints on alienation "is directed against the provisions in contracts or conveyances. It has no application to disabling restraints established by express statute."]; Rest., Property, pp. 2377, 2381.) None of the cases cited by plaintiffs or amici supports a contrary view.

D. Retaliatory Eviction Presumption

Typically, rent control schemes include eviction controls that require "good cause" in order for a landlord to bring an eviction action. Without such controls, "the security of tenure objectives of rent control laws could be undermined and the threat of eviction could be used to nullify the operation of rent regulations." (Baar, supra, 35 Rutgers L.Rev. at p. 833.)

Accordingly, section 14 of the ordinance[54] restates this court's established holding that a landlord's retaliation against a tenant for the tenant's assertion or exercise of rights is a defense to eviction. (*Schweiger* v. *Superior Court* (1970) 3 Cal.3d 507, 517.) The section then provides that, in an action by the landlord to recover possession or in an affirmative action taken by the tenant for damages, "evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory." As originally enacted, the section provided that " '[p]resumption' means that the Court must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." After the trial court's judgment in this case the latter sentence was amended in 1982 (see *ante*, p. *, fn 2) to read, " '[p]resumption' means that

[54] As amended in 1982 (see *ante*, p. *, fn. 2), the section provides (deletions are stricken with a horizontal line; additions are in italics): "No landlord may threaten to bring, or bring, an action to recover possession, cause the tenant to quit the unit involuntarily, *serve any notice to quit or notice of termination of tenancy,* decrease any services or increase the rent where the landlord's intent is retaliation against the tenant for the tenant's assertion or exercise of rights under this Ordinance. Such retaliation shall be a defense to an action to recover possession, or it may serve as the basis for an affirmative action by the tenant for actual and punitive damages and injunctive relief. In an action by or against a tenant, evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory. 'Presumption' means that the Court must find the existence of the fact presumed unless and until ~~evidence is introduced which would support a finding of its nonexistence~~ *its nonexistence is proven by a preponderance of the evidence.* A tenant may assert retaliation affirmatively or as a defense to the landlord's action without the aid of the presumption *regardless of the period of time which has elapsed between the tenant's assertion or exercise of rights under this Ordinance and the alleged act of retaliation.*"

* *Infra* A-4.

the Court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence."

1. *Classification of the Presumption.* Plaintiffs claim that section 14 purports to create a presumption affecting the burden of proof, and that such presumptions created by municipal ordinance are preempted by state law. (Evid. Code, § 500.) Defendants apparently respond that section 14 creates merely a presumption affecting the burden of producing or going forward with evidence, and that, even if it does create a presumption affecting the burden of proof, section 500 and other relevant sections of the Evidence Code allow such a presumption.

a. *Presumption Affecting the Burden of Producing Evidence.* The burden of producing evidence refers to a party's obligation to introduce evidence sufficient to establish a prima facie case, or, in other words, sufficient to avoid nonsuit. (Evid. Code, § 110.) "A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, § 603.) The code makes clear that the purpose of such a rebuttable presumption relates solely to judicial efficiency, and does not rest on any public policy extrinsic to the action in which it is invoked. A presumption affecting the burden of producing evidence is based on an underlying logical inference that the presumed fact very likely follows from the proved fact; the presumption is designed to avoid unnecessary proof of facts likely to be true if not disputed. Especially relevant to the present case, such a rebuttable presumption is designed to place the responsibility for establishing the nonexistence of certain facts on the party most able to do so. As observed in the California Law Revision Commission's comment on section 603, "[t]he presumptions described in [that section] are not expressions of policy; they are expressions of experience. They are intended solely to eliminate the need for the trier of fact to

reason from the proven or established fact to the presumed fact and to forestall argument over the existence of the presumed fact when there is no evidence tending to prove the nonexistence of the presumed fact."

If the presumption established in section 14 affects the burden of producing evidence, a tenant who shows an assertion or exercise of rights under the ordinance within six months of an eviction proceeding will have established either (1) a prima facie defense to eviction (and will hence avoid nonsuit), or (2) a prima facie case for damages, unless the landlord rebuts the presumption by evidence supporting its nonexistence by a preponderance of the evidence. (Evid. Code, §§ 110, 604.) As noted in the Assembly Committee on the Judiciary's comment on section 604, "[s]uch a presumption is merely a preliminary assumption in the absence of contrary evidence."

b. *Presumption Affecting the Burden of Proof.* The burden of proof, on the other hand, refers to a party's obligation to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact. (Evid. Code, § 115.) Unlike presumptions affecting the burden of producing evidence, which exist merely to expedite resolution of disputes, "[a] presumption affecting the burden of proof is a presumption established to implement some public polity other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property. . . ." (Evid. Code, § 605.) The purpose of such a rebuttable presumption relates to public policy goals "other than or in addition to the policy of facilitating the trial of actions." (Cal. Law Revision Com. com. on Evid. Code, § 605.) As the California Law Revision Commission observes, "[f]requently, presumptions affecting the burden of proof are designed to facilitate determination of the action in which they are applied. Superficially, therefore, such presumptions may appear merely to be presumptions affecting the burden of producing evidence. What makes a presumption one affecting the burden of proof is the fact that there is always some further reason of policy for the establishment of the presumption. It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence." (Ibid.)

If a presumption affecting the burden of proof is established by section 14, a tenant who shows an assertion or exercise of rights under the ordinance within six months of the eviction proceeding will effectively shift to the landlord the burden of disproving the tenant's defense or case for damages, by requiring the landlord to prove to the trier of fact, by a preponderance of the evidence, that eviction was not retaliatory. (Evid. Code, §§ 115, 606.) In other words, unlike presumptions affecting the burden of producing evidence, which would merely protect a tenant against nonsuit, a presumption affecting the burden of proof would shift the ultimate responsibility of persuasion to the landlord.

c. *Presumption Created by the Amendment.* Defendants concede that it is difficult to classify the presumption created by section 14. Plaintiffs implicitly recognize the same problem: although they characterized the amended presumption in earlier briefs as a valid presumption affecting the burden of producing evidence, in recent briefs they claim it is an invalid presumption affecting the burden of proof.

Viewing the section's language in the context of the entire ordinance, and in light of the earlier preamendment version, we must agree with plaintiffs that the amended section 14 presumption affects the burden of proof. Regarding the latter point first, we note that the preamendment language paralleled Evidence Code section 604's description of the effect of a presumption affecting the burden of producing evidence: former section 14 specified that "the Court must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." Evidence Code section 604 similarly provides that a presumption affecting the burden of producing evidence "require[s] the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence."

It thus seems reasonably clear that the former section established a presumption affecting the burden of producing evidence. It would also be reasonable to assume that the amendment was intended to change, rather than simply restate or clarify, the original presumption. First, the amendment

specifically omitted reference to introduction of evidence that would support a finding of the presumed fact's nonexistence—and therefore it departs from the express language of Evidence Code section 604. Moreover, to the extent the amendment was intended to clarify and restate the previous presumption that affected only the burden of producing evidence, the new section would quite obviously be a failure—because its language describes that kind of presumption even less clearly than did its predecessor.

The suggestion that the amendment was intended to implement a presumption affecting the burden of proof, and not merely one affecting the burden of producing evidence, is further supported by defendants' own description of the purpose of the amended presumption. Defendants claim the presumption is intended to further the municipality's policy against retaliatory evictions and to promote the policy of encouraging tenants to exercise their rights under the ordinance. In view of the previous section's subsequent amendment—and because, as defendants admit, section 14 is designed to further policies extrinsic to, or in addition to, the policy of facilitating determination of particular eviction actions—we must conclude that the amended section creates a presumption affecting the burden of proof.

2. *Direct Preemption by the Evidence Code.* Although municipalities have power to enact ordinances creating substantive defenses to eviction (*Birkenfeld,* supra, 17 Cal.3d 129, 149), such legislation is invalid to the extent it conflicts with general state law. (Id. at p. 152; Cal.Const., art XI, § 7.) Plaintiffs claim that section 14, as amended, directly conflicts with Evidence Code section 500, which states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." They note that under section 14, proof of retaliation is "essential" to establishing the tenant's defense or claim for relief; therefore, they argue, Evidence Code section 500, requires that the tenant prove the fact of retaliation.

Defendants respond that Evidence Code section 500 by its own terms does not apply to situations "otherwise provided [for] by law." Plaintiffs, in turn, maintain that this exception does not contemplate local ordinances or charter amendments.

The term "law," as used in Evidence Code section 500, is defined as including "constitutional, statutory, and decisional law." (Evid. Code, § 160.) Defendants contend that section 160 was not intended to exclude local ordinances as a source of "law," but was merely intended to make clear that the term "law" includes judicial decisions. (See Cal. Law Revision Com. to § 160.) They therefore invite us to construe "statutory" as including ordinances.

Indeed, there have been cases in which courts have suggested that the term "statutes" embraces local ordinances. (*City of Los Angeles* v. *Belridge Oil Co.* (1954) 42 Cal.2d 823, 833-834; *King Mfg. Co.* v. *Augusta* (1928) 277 U.S. 100, 102-114.) Neither of those cases, however, assists defendants. In *Belridge* we observed that a city licensing ordinance could be construed as a statute under the statute of limitations; in *King* the United States Supreme Court construed an ordinance as a statute for the purpose of satisfying jurisdiction. But, in neither case did the court address issues remotely approaching the question posed here: whether a local ordinance can be deemed a "statute" for purposes of deviating from the established rules of evidence relating to burden of proof.

The answer to this question would seem so settled that, like other firm rules of law, few courts have recently had occasion to address the issue. Long before enactment of Evidence Code sections 500 and 160, we suggested that municipal governments have no authority to depart from the common law of evidence. (*Orena* v. *City of Santa Barbara* (1891) 91 Cal. 621, 629 [an "ordinance is void . . . [to the extent that it purports to] lay down rules of evidence . . ."].) Similarly, commentators have maintained that, "[w]ithout express authority the general rules of evidence or procedure may not be changed by ordinance by a municipal corporation" (9 McQuillin, Municipal Corporations (3d ed. 1978) § 27.45, p. 670; see also 2 Dillon, Municipal Corporations (5th ed. 1911) § 643, p. 983), and

that, "[u]nlike the legislature, the governing body of a municipal corporation has no power to prescribe rules of evidence for the guidance of courts. Therefore, a municipal ordinance . . . concerning the burden of proof [is void]." (31 Cal.Jur.3d, Evidence, § 5, at p. 37.) See also *Cohen* v. *St. Louis Merchants' Bridge Terminal Ry.* (Mo.Ct.App. 1916) 181 S.W. 1080, 1081-1082 (" 'The City cannot by ordinance in any wise change or alter the ordinary rules of evidence applicable in this court' "); *Fitch* v. *Pinckard* (Ill. 1842) 4 Scam. 69, 78 (5 Ill. 72, 81) ("[T]he [municipal] corporation exceeded its powers, in declaring that the collector's deed should be evidence of a compliance with all the prerequisites of the ordinance. The legislature alone possesses the power to make, change, or alter the rules of evidence."); cf., *The City Council* v. *Dunn* (S.C. 1821) 1 McCord 333 (in absence of statutory provision to the contrary, an ordinance may not depart from the common law rules of evidence).

Given this background, we cannot believe that the Legislature, when it enacted Evidence Code sections 500 and 160 in 1965, ever intended municipal ordinances to come within the exception clause of Evidence Code section 500. Whether the Evidence Code directly or by implication preempts a local ordinance that purports to create a presumption shifting the burden of producing evidence is a separate issue, on which we reserve decision. (See Evid. Code, § 550, subd. (b).) For now, we conclude that the Legislature deliberately excluded ordinances from those sources of law that may change the traditional allocation of the burden of proof, and that the presumption in section 14 shifting the burden of proof, on its face, directly conflicts with the Evidence Code. (§ 500.) To that extent, the ordinance is invalid.

E. Due Process and Preemption Challenges to the Ordinance's Rent Withholding Provisions

Section 15[55] sets out remedies for landlords' violations of the ordinance—e.g., failure to register pursuant to section 8,[56] or charging of rents above those permitted under sections 11 and 12. Section 15, subdivision (a), provides for tenant-initiated remedies: under subsection (1) of that subdivision, a tenant may petition the Board for permission to withhold rent until the landlord complies with the ordinance. Subsection (2) permits the same withholding remedy, even without Board permission, and provides a defense to unlawful detainer if the tenant believes in good faith that the landlord has not complied with the ordinance.[57] Subsection (3) permits a tenant to sue for injunctive relief, and subsection (4) permits a tenant to sue the landlord for money damages.

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[55] This section provides in full:

"a. For Violation of Rent Ceilings or Failure to Register. If a landlord fails to register in accordance with Section 8 of this Ordinance, or if a landlord demands, accepts, receives or retains any payment in excess of the maximum allowable rent permitted by this Ordinance, a tenant may take any or all of the following actions until compliance is achieved:

"(1) A tenant may petition the Board for appropriate relief. If the Board, after the landlord has proper notice and after a hearing, determines that a landlord has wilfully and knowingly failed to register a rental unit covered by this Ordinance or violated the provisions of Sections 10, 11 and 12 of this Ordinance, the Board may authorize the tenant of such rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is brought into compliance with this Ordinance. After a rental unit is brought into compliance, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not in compliance. Whether or not the Board allows such withholding, no landlord who has failed to comply with the Ordinance shall at any time increase rents for a rental unit until such unit is brought into compliance.

"(2) A tenant may withhold up to the full amount of his or her periodic rent which is charged or demanded by the landlord under the provisions of this Ordinance. In any action to recover possession based on nonpayment of rent, possession shall not be granted where the tenant has withheld rent in good faith under this Section.

"(3) A tenant may seek injunctive relief on behalf of herself or himself to restrain the landlord from demanding or receiving any rent on the unit until the landlord has complied with the terms of this Ordinance.

(Footnotes continued on following page)

Subdivision (c) permits the city attorney to sue landlords for injunctive relief, and subdivision (d) permits the Board to do the same. Subdivision (e) permits the Board to settle claims on behalf of tenants.

Plaintiffs focus on the rent withholding provisions of subdivision (a), subsections (1) and (2), which they claim are preempted by state law. Additionally, plaintiffs assert that

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(Footnotes continued from preceding page)

"(4) A tenant may file a damage suit against the landlord for actual damages when the landlord receives or retains any rent in excess of the maximum rent allowed under this Ordinance. Upon further proof of a bad faith claim by the landlord or the landlord's retention of rent in excess of the maximum rent allowed by this Ordinance, the tenant shall receive a judgment of up to seven hundred and fifty dollars ($750.00) in addition to any actual damages.

"b. For Violation of Eviction Proceedings. If it is shown in the appropriate court that the event which the landlord claims as grounds to recover possesssion under Subsection 13.a.(7), Subsection 13.a.(8), Subsection 13.a.(9), or Subsection 13.a.(10) is not initiated within two months after the tenant vacates the unit, or it is shown the landlord's claim was false or in bad faith, the tenant shall be entitled to regain possession and to actual damages. If the landlord's conduct was willful, the tenant shall be entitled to damages in an amount of $750 or three times the actual damages sustained, whichever is greater.

"c. The City Attorney may bring an action for injunctive relief on behalf of the City or on behalf of tenants seeking compliance by landlords with this Ordinance.

"d. The Board may seek injuctive relief to restrain or enjoin any violation of this Ordinance or of the rules, regulations, orders and decisions of the Board.

"e. If a tenant fails to bring a civil or administrative action within one hundred and twenty (120) days from the date of the first occurrence of a violation of this Ordinance, the Board may either settle the claim arising from the violation or bring such action. Thereafter, the tenant on whose behalf the Board acted may not bring an action against the landlord in regard to the same violation for which the Board has made a settlement or brought an action. In the event the Board settles the claim it shall be entitled to retain from any payments made by the landlord, the costs it incurred in settlement, and the tenant aggrieved by the violation shall be entitled to the remainder."

[56] This section provides, inter alia, that by a specified date landlords must file a rent registration form showing rents in effect on certain prior dates for each rental unit covered by the ordinance.

[57] Defendants point out that although the subsection (2) remedy might be more effective, the subsection (1) remedy is available for those tenants who would hesitate to take such action without prior approval of an official agency.

subsection (2) denies them due process on numerous grounds. We address plaintiffs' due process claims first.

1. *Due Process.* Subdivision (a), subsection (2), allows a tenant to withhold the "full amount" of his periodic rent until the landlord's compliance with the ordinance is achieved. It provides further that "[i]n any action to recover possession based on nonpayment of rent, possession shall not be granted where the tenant has withheld rent in good faith under this Section."

a. *Reasonable Relationship to the Purpose of the Ordinance.* Plaintiffs first contend that the "extreme 'remedy' " of subsection (2) is not reasonably related to the purpose of the ordinance because it is available not only when a landlord charges excessive rents, but also when a landlord fails to register. As defendants observe, however, ensuring landlord registration is crucial to the purpose of the ordinance, because without registration the ordinance cannot be enforced.

Moreover, defendants note that all other enforcement remedies listed above except for subdivision (a), subsection (2), suffer the same serious weakness: to invoke them can cost substantial amounts of money, either to the tenant or to the Board. At the same time, the structure of the ordinance makes the question of funding crucial. Section 6, subdivision (n),[58] provides that funding for the Board's expenses shall be from annual landlord registration fees,[59] and not from the city's general fund. Therefore, defendants observe, the Board is

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[58] That subdivision provides in part: "The Board shall finance its reasonable and necessary expenses for its operation without the use of General Fund monies of the City of Berkeley except as stated in this subsection, by charging landlords an annual registration fee of twelve dollars ($12.00) per unit, per year in the first year of operation. After the first year, upon request by the Board the City Council may make reasonable annual adjustments in the fee. The Board is also empowered to request and receive funding when and if necessary, from any available source, except the City of Berkeley's General Fund, for its reasonable and necessary expenses, including but not limited to salaries and all other operating expenses."

[59] The annual registration fee for the first year of operation was $12 per unit. The city council, on request of the Board, may make reasonable annual adjustments in the fee. (Ibid.; see Baar, supra, 35 Rutgers L. Rev. at p. 763, table 5.1 [comparing funding provisions of various rent control ordinances].)

essentially dependent on landlords' registration fees to (i) pay the staff it needs to gather information for its general rent adjustment hearings under section 11; (ii) pay examiners to handle individual rent adjustment hearings under section 12; and (iii) employ counsel to bring suits under section 15, subdivisions (c) and (d), against landlords who refuse to register or who charge rents beyond the maximum allowed. On the other hand, defendants argue, the tenant-initiated remedies, with the exception of subdivision (a), subsection (2), cannot be relied on to enforce the ordinance. Although subdivision (a), subsection (1), permits a tenant to seek Board authorization to withhold rent, if landlords fail to register, the Board may lack funds to hire hearing examiners and other staff to hold hearings on such petitions. And, whereas subdivision (a), subsection (3), permits a tenant to sue for injunctive relief, there is no certainty that many tenants will expend the time or money to pursue that course. Finally, subdivision (a), subsection (4), permits a tenant to sue for damages when the landlord receives more than the maximum rent allowed by the ordinance; and subdivision (b) allows a tenant to sue for damages when the landlord violates certain restrictions on evictions: but neither section gives any remedy for the landlord's failure to register. Other provisions—section 11, subdivision (f), subsection (1)[60] and section 12, subdivision (f), subsection (1),[61] forbid a landlord who has failed to register—"after order of the Board-"—from taking advantage of general and individual rent increases allowed by the Board. But if landlords fail to register in significant numbers, the Board might be unable to hire the staff needed to assist in issuing the "orders" required by these two subsections.

Defendants thus proclaim the importance of the section 15, subdivision (a), subsection (2), rent withholding provision: it

[60] See *ante*, page *, footnote 44.

[61] That subdivision and subsection provide:
"f. No upward adjustment of an individual rent ceiling shall be authorized by the Board under this Section if the landlord:
"(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and/or orders or regulations issued thereunder by the Board ...."
* *Infra* A-47.

suffers none of the "weaknesses" discussed above; it is claimed to be simple, direct, and self-enforcing. We conclude that defendants' rent withholding provision is reasonably related to achieving the legitimate purposes of the ordinance.

b. *Vagueness.* Plaintiffs next complain that section 15, subdivision (a), subsection (2), is unconstitutionally vague and overbroad. We will uphold the subsection against this challenge if it (1) gives fair notice of the practice to be avoided, and (2) provides reasonably adequate standards to guide enforcement. (*Connally* v. *General Const. Co.* (1926) 269 U.S. 385, 391; see generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court* (1960) 109 U.Pa.L.Rev. 67; Note, *Due Process Requirements of Definiteness in Statutes* (1948) 62 Harv.L.Rev. 77.)

(i) Fair Notice

Fair notice, as applied to the present inquiry, requires only that the subsection's terms be described with a reasonable degree of certainty so that an ordinary landlord can understand what conduct is proscribed on his part, and under what conditions his rent-withholding tenant will be afforded a defense to an unlawful detainer action. (Cf. *Burg* v. *Municipal Court* (1983) 35 Cal.3d 257, 270-271 and cases cited.)

Plaintiffs contend that the subsection is ambiguous "as to the most basic components of the tenant's right to a remedy: who may take remedial action, in what amount and for how long"? We believe that the word "tenant" is clearly limited to a lessee, assignee or sublessee who has been charged excessive rent, or who lives in an unregistered apartment. Plaintiffs also claim the subsection is unclear as to who is to determine whether the landlord has violated the ordinance, and who is to determine when the landlord has achieved compliance. But we believe the answer is obvious: the trial court will determine these issues, if and when the landlord sues to evict for nonpayment of rent. Plaintiffs further claim that the subsection does not specify the amount of rent that may be withheld, but on its face the provision allows withholding "up to the full amount" of the tenant's periodic rent. Although such full withholding may be harsh, plaintiffs cannot successfully con-

tend that it is not rationally related to achieving compliance with the ordinance.

Finally, plaintiffs claim that the subsection "condemns the landlord to an indefinite sentence" because it does not specify when, if ever, the withheld rent shall be paid. To the contrary, subsection (2), read in conjunction with its introductory provision (subd. (a)), clearly establishes that the withholding remedy is allowed only until the landlord complies with the ordinance by registering and abiding by the maximum rent schedule that applies to him.[62] Nor do we accept plaintiffs' contention that the word "register" provides inadequate notice to landlords. That word, as well as the above terms and provisions, is sufficiently certain to inform landlords of both the conduct needed to comply with the subsection's requirements, and the circumstances that will afford his tenant a defense to an unlawful detainer action.

(ii) Standards for Enforcement

Plaintiffs also make a cryptic allegation that the subsection's withholding provision and the qualified defense it confers are dangerously susceptible of arbitrary "enforcement" by those who have the power to invoke it—the tenants. Their concern, apparently, is with the fact that application of the subsection hinges ultimately on a tenant's "good faith belief" that a landlord has failed to comply with the ordinance.

Contrary to plaintiffs' suggestion, however, the question of the applicability of subsection (2) is not contingent on the arbitrary or personal predilections of the tenant. (E.g., *Smith* v. *Goguen* (1974) 415 U.S. 566, 573.) Although the "good faith belief" required to invoke the provision is not a precisely measurable standard, neither is it incapable of reasonably exact determination. The determination of whether a tenant had the requisite good faith belief at the time he withheld rent is not to

[62] Indeed, the record contains the following regulation adopted by the Board on September 24, 1980: "The remedy of rent withholding provided to tenants under 15(a)(1) and 15(a)(2) shall not be construed to relieve the tenant of the obligation to pay whatever rent is subsequently deemed lawfully owed for the time period for which the rent was withheld. This rule shall be publicized and promulgated immediately."

be made by the tenant; it is instead a question for the trial court, to be decided only for the narrow purpose of establishing a defense to a landlord's eviction suit. Thus viewed in proper context, the provision poses little threat of arbitrary application, and hence is not properly subject to facial invalidation on this ground.

c. *Procedural Due Process and Confiscation.* Plaintiffs finally claim that the ordinance provides them no "due process protection" before their rents are "confiscated" pursuant to subdivision (a), subsection (2). Viewing application of the withholding provision in the proper context, however, discloses the false assumptions underlying plaintiffs' concern. As noted, the applicability of the withholding provision and the qualified defense it confers comes into question only after the landlord has initiated a wrongful detainer action. The provision affords the landlord no less due process protection than he would have normally; its sole effect is to create a substantive defense to eviction for nonpayment of rent if the tenant's withholding is found to have been made pursuant to a good faith belief that his landlord had not complied with the ordinance. Similarly, the provision produces no confiscatory result: it does not deprive the landlord of rent due, because, even if it is found that the tenant withheld in good faith, the landlord may sue and recover the full amount of back rent as soon as the court is persuaded that compliance with the ordinance has been achieved. On the other hand, if it is found that the tenant's withholding was not in good faith, the landlord may recover possession in unlawful detainer and may also sue for full back rent in an amount consistent with the ordinance. We conclude that, on the face of the ordinance, the withholding and qualified defense provisions of subdivision (a), subsection (2), neither deprive landlords of due process, nor do they produce confiscatory results. (Cal.Const., art. I, §7.) At most, the subsection creates a substantive defense to unlawful detainer actions as a means of ensuring compliance with the ordinance.

2. *Preemption.* Every California city possesses the general power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal.Const., art. XI, §7.) In addition,

charter cities have even greater authority: they have exclusive power to legislate over "municipal affairs." (Cal. Const., art. XI, §5, subd. (a).)[63] Similar to the defendant city's concession in *Birkenfeld* that "rent control is not a municipal affair as to which a charter provision would prevail over general state law" (17 Cal.3d at p. 141), defendants now do not claim that provision for rent withholding in section 15, subdivision (a), is a municipal affair that overrides general state law. Instead, defendants assert their power to implement the rent withholding provision based on the right of all cities to regulate matters not in conflict with general laws. Thus, assuming without deciding that the ordinance's rent withholding provisions do not relate to a "municipal affair," we turn to whether defendants' regulation is in conflict with, and hence preempted by, state law. (Hiscocks & Backes, *Charter City Financing in California—A Growing "Statewide Concern"?* (1982) 16 U.S.F. L.Rev. 603, 613-614.)

Plaintiffs first claim that general law directly conflicts with the rent withholding provisions of subdivision (a). Alternatively, they insist that rent withholding is preempted by implication in light of three statutes that are asserted to occupy the field of "when rent is due." For both contentions, plaintiffs rely exclusively on Civil Code section 1947, which provides for the timing of the payment of rent if there is no usage or contract to the contrary;[64] Code of Civil Procedure section 1161,[65] which

[63] Article XI, section 5, subdivision (a) provides: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith."

[64] That section states: "When there is no usage or contract to the contrary, rents are payable at the termination of the holding, when it does not exceed one year. If the holding is by the day, week, month, quarter, or year, rent is payable at the termination of the respective periods, as it successively becomes due."

[65] That section provides: "A tenant of real property . . . is guilty of unlawful detainer: 1. When he continues in possession . . . after the expiration of the term . . . . [¶] 2. When he continues in possession . . . after default in the payment of rent . . . . [¶] 3. When he continues in possession . . . after a neglect or failure to perform other conditions or covenants of the lease . . . ."

describes the circumstances under which a tenant is guilty of unlawful detainer; and Civil Code section 1942,[66] which identifies circumstances under which a tenant may withhold rent and utilize those funds to repair deficiencies rendering the premises untenantable.

Defendants respond that these sections have nothing to do with local rent withholding provisions designed to enforce local rent control; that the withholding provisions of the ordinance do not regulate when rent is due, but instead establish a substantive defense to unlawful detainer; and that plaintiffs' cited statutes cannot be interpreted to even address, much less fully occupy, that field. Furthermore, they claim *Birkenfeld* establishes that these provisions are not preempted by state law.

a. *Direct Conflict.* In *Birkenfeld* we responded to three preemption arguments. The plaintiffs in that case claimed preemption of (1) the field of "rent," (2) the field of defenses to eviction, and (3) the field of procedural requisites to a landlord filing an eviction action. We determined that the previous ordinance's requirement of a certificate of eviction by the rent control board before a landlord was allowed to commence unlawful detainer proceedings was invalid because such a requirement would "nullify the intended summary nature of the remedy." (17 Cal.3d 129, 151.) By contrast, however, we found that although there is "extensive state legislation governing many aspects of landlord-tenant relationships, some of which pertain specifically to the determination or payment of rent" (citing, inter alia, Civ. Code, §1942 and Civ. Code, §1947), "neither the quantity nor the content of these

[66] That section provides: "(a) If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of Section 1962, of dilapidations rendering the premises untenantable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month's rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any 12-month period. . . . [¶] (d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law."

statutes establishes or implies any legislative intent to exclude municipal regulation of the amount of rent based on local conditions." (Id. at pp. 141-142; see *Galvan* v. *Superior Court* (1969) 70 Cal.2d 851, 860-864.)

More significant to the present question, we rejected the plaintiffs' claims that the field of defenses to eviction suits is preempted by general law. The former Berkeley ordinance limited permissible bases for eviction to specific enumerated grounds, but omitted a landlord's right to evict merely to terminate the tenancy. The ordinance thus prohibited eviction of a tenant "who [was] in good standing at the expiration of the tenancy unless the premises [were] to be withdrawn from the rental housing market or the landlord's offer of a renewal lease [had] been refused." (17 Cal.3d at p. 148.) Addressing the state law relevant to the issue, we observed that "Code of Civil Procedure section 1161, subdivision 1, makes the continuation of a tenant's possession after expiration of the term a form of unlawful detainer for which the landlord may recover possession in summary proceedings under Code of Civil Procedure section 1164 et seq. However, these statutory provisions are not necessarily in conflict with the charter amendment's provision forbidding landlords to recover possession upon expiration of a tenancy if the purpose of the statutes is sufficiently distinct from that of the charter amendment. (See *Galvan* v. *Superior Court, supra,* 70 Cal.2d 851, 859; *People* v. *Mueller, supra,* [1970] 8 Cal.App.3d 949, 954.) The purpose of the unlawful detainer statutes is procedural. The statutes implement the landlord's property rights by permitting him to recover possession once the consensual basis for the tenant's occupancy is at an end. In contrast *the charter amendment's elimination of particular grounds for eviction is a limitation upon the landlord's property rights under the police power, giving rise to a substantive ground of defense in unlawful detainer proceedings. The mere fact that a city's exercise of the police power creates such a defense does not bring it into conflict with the state's statutory scheme. Thus . . . the statutory remedies for recovery of possession and of unpaid rent* (see Code Civ. Proc., §§1159-1179a; Civ. Code, §1951 et seq.) *do not preclude a defense based on municipal rent control legislation enacted*

pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings." (Id. at pp. 148-149 (emphasis added)), citing *Inganamort* v. *Borough of Fort Lee* (N.J. 1973) 303 A.2d 298, 307 and *Warren* v. *City of Philadelphia* (Pa. 1955) 115 A.2d 218, 221.)

We believe that the above-quoted language from *Birkenfeld* disposes of plaintiffs' claim that the rent withholding provision of the ordinance directly conflicts with Code of Civil Procedure section 1161. It is true that the tenant's good faith defense conferred under subdivision (a), subsection (2), effectively eliminates one ground for eviction, but as we observed in *Birkenfeld,* this exercise of the municipality's police power does not bring the provision into conflict with state law, because the statutory remedy for recovery of possession does not preclude limitations on grounds for eviction for the purpose of enforcing a local rent control regulation.

Furthermore, we are not persuaded that the ordinance conflicts with Civil Code sections 1942 or 1947. Neither statute involves the field of defenses to eviction, or enforcement of local rent control ordinances. Section 1942 is this state's "repair and deduct statute." It specifically allows rent withholding, under certain circumstances, in order for a tenant to make needed repairs. Section 1947 merely establishes rules relating to the date at which rent is due, depending on the term of a tenant's holding. We find nothing in either section that directly conflicts with the municipal legislation at issue here. We conclude, as did the Supreme Court of New Jersey in a similar context, that merely because defendants' ordinance "imposes restraints which the State law does not, does not spell out a conflict between State and local law. On the contrary the absence of a statutory restraint is the very occasion for municipal initiative. The police power is vested in local government to the very end that the right of property may be restrained when it ought to be because of a sufficient local need." (*Inganamort,* supra, 303 A.2d at p. 307.)

b. *Preemption by Implication.* We will be reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another. (*Gluck* v. *County*

of Los Angeles (1979) 93 Cal.App.3d 121, 133; Comment, *The California City Versus Preemption by Implication* (1966) 17 Hastings L.J. 603, 610.) Furthermore, the mere fact that all three of plaintiffs' cited statutes concern "rent" does not assist them because "[a] field cannot properly consist of statutes unified by a single common noun." (*Galvan,* supra, 70 Cal.2d 851, 862.) A potentially preemptive "field" of state regulation is "an area of legislation which includes the subject of the local legislation, and is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject." (Ibid.)

In re Hubbard (1964) 62 Cal.2d 119, we articulated three tests to determine in what circumstances chartered cities might be deprived of their supposed exclusive power to legislate in regard to "municipal affairs" pursuant to article XI, section 5 of our Constitution. (Id. at p. 128.) Although we subsequently declined to follow *Hubbard*'s approach to municipal affairs questions (*Bishop* v. *City of San Jose* (1969) 1 Cal.3d 56, 63, fn. 6), in *Galvan,* supra, we adopted *Hubbard*'s three tests as standards by which to judge preemption of municipal exercise of police powers pursuant to article XI, section 7. The *Hubbard* factors, reincarnated as a preemption test in *Galvan,*[67] establish that we may infer an intent to preempt defendants' legislation only if " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; [or] (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.' " (70 Cal.2d at pp. 859-860, quoting *Hubbard,* supra, 62 Cal.2d at p. 128; see also *People ex rel. Deukmejian* v. *County of Mendocino* (1984) 36 Cal.3d 476, 485; *Palos Verdes Estates,* supra, 142 Cal.App.3d

[67] See Sato, *"Municipal Affairs" in California* (1972) 60 Cal.L.Rev. 1055, 1073, footnote 68 (*Galvan's* preemption analysis relies on that part of *Hubbard* relating to municipal affairs).

362, 373-374 [quoting and following *Galvan*]; *Gregory,* supra, 142 Cal.App.3d 72, 82 [quoting and following *Hubbard*]; *Bamboo Brothers* v. *Carpenter* (1982) 133 Cal.App.3d 116, 124 [same]; *Music Plus Four, Inc.* v. *Barnet* (1980) 114 Cal.App.3d 113, 123 [same]; *People* v. *Mueller* (1970) 8 Cal.App.3d 949, 953-954 [quoting and following both *Hubbard* and *Galvan*]; Comment, *Of Lawyers, Guns, and Money: Preemption and Handgun Control* (1982) 16 U.C. Davis L.Rev. 137, 150-165 [asserting that the *Hubbard* tests are the most widely used approach to the issue of implied preemption]; cf. Rossmann & Steel, *Forging the New Water Law: Public Regulation of "Proprietary" Groundwater Rights* (1982) 33 Hastings L.J. 903, 937-942 [analyzing implied preemption under the three *Hubbard/Galvan* tests].)

Applying these alternative tests, we must conclude that there is no full and complete state coverage of the field of rent withholding so as to "clearly indicate" that the field "has become exclusively a matter of state concern." Neither the quantity nor the content of plaintiffs' cited statutes suggests the Legislature's intent to occupy the field of rent withholding to the exclusion of municipally created defenses to unlawful detainer actions. Nor do the three statutes suggest that the field of rent withholding is clearly a subject of paramount state interest that cannot tolerate any local involvement. Indeed, we fail to discern how defendants' withholding provisions would frustrate state statutory schemes that relate to unlawful detainer procedures, repair and deduct remedies, or that define the duration of rental periods.

Finally, existence of defendants' provisions are likely to have very little effect on transient citizens, much less an effect that outweighs the local benefit to be derived from the withholding provisions. First, many transients will not be affected by the ordinance, because it does not apply to "hotels, motels, inns, tourist homes, and rooming or boarding houses" in which "transient guests" stay for 14 days or less. (§ 5, subd. (b).) Second, to the extent that transients might be affected, the withholding provision would likely have a positive effect, because it would help assure prospective newcomers that established maximum housing rents will be enforced.

We therefore conclude that section 15, subdivision (a), subsections (1) and (2), are not preempted by state law. The ordinance's provision authorizing rent withholding and establishing a qualified defense to unlawful detainer actions regulates a field of great importance to the effective operation of defendant's rent control scheme, and one which is distinct from any other state regulation. Even assuming that state regulations touch on rent withholding, we discern no legislative intent to preempt defendants' regulation.

The judgment is affirmed. The 1982 amendment to section 14, purporting to create a presumption affecting the burden of proof, is invalid. This provision is clearly severable. (§ 16.) All other provisions of the ordinance are valid and enforceable. Each party shall bear its own costs.

MOSK, J.

WE CONCUR: REYNOSO, J.
GRODIN, J.
*COOPERMAN, J.
*MILLS, J.

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* Assigned by the Chairman of the Judicial Council

CONCURRING OPINION BY BIRD, C.J.

I agree with Part II of the majority opinion. I also agree with the substantive analysis of the antitrust issues in Part I. However, I write separately to raise a concern regarding the highly unusual manner in which the antitrust issues came before this court.

No mention of antitrust law was made by the litigants in the trial court or in the Court of Appeal below. The argument that federal antitrust law might render defendants' rent control ordinance invalid was first raised in this court, and then only *after* the decision had been made to grant a hearing. Moreover, that issue was raised by an amicus curiae rather than a party to the appeal.

A cautionary note should be sounded to dispel any belief that this court will routinely agree to address issues presented in this manner.

As the majority correctly note, the issue of whether a municipal regulation might be subject to antitrust scrutiny first arose in *Community Communications* v. *Boulder* (1982) 455 U.S. 40. *Boulder* was decided on January 13, 1982, a month *after* plaintiffs' closing brief had been filed in the Court of Appeal. Plaintiffs cannot, therefore, be faulted for failing to raise that issue in the trial court or in their opening and closing briefs in the Court of Appeal.

However, the Court of Appeal did not hear oral argument until July 5, 1983, a year and a half *after* the *Boulder* decision. During that entire period, neither plaintiffs nor amicus attempted to call the case to the lower court's attention—despite that court's willingness to permit additional briefing as evi-

denced by its acceptance as late as June 17, 1982, of a brief by amicus curiae for defendants. (See Cal. Rules of Court, rule 14(b).) The Court of Appeal was thus deprived of an opportunity to rule on that issue.

The Court of Appeal filed its now-vacated opinion on October 24, 1983. Defendants' petition for hearing was filed in this court on December 7, 1983, nearly two full years after *Boulder* was decided. Plaintiffs' answer to that petition, filed some two weeks later, *made no mention of Boulder or of the possible application of federal antitrust law to this case.* Hence, when this court granted the petition for hearing, it had not been apprised by either party that the case presented issues which, in the majority's words, would force the court to "wander off the map and travel cross country without the benefit of trail or compass." (Maj. opn., *ante,* at pp. - [typed maj. opn. at pp. 23-24].) The antitrust issues were first brought to the court's attention several weeks later when amicus curiae requested leave to file a brief in support of plaintiffs.

The majority assert that consideration of the antitrust issues is nevertheless proper under several well established principles. They correctly note that on appeal from a judgment granting or denying an injunction, a reviewing court will apply the law as it stands at the time its opinion is filed. (*Cal-Dak Co.* v. *Sav-On Drugs, Inc.* (1953) 40 Cal.2d 492, 496-497.) They also recite the familiar rule which permits a *party* to raise on appeal a new point of law decided while the appeal is pending. (*Claremont Imp. Club* v. *Buckingham* (1948) 89 Cal.App.2d 32,33.)

However, they do not explain why the same rule should apply where, as here, the new issue is raised not by a party but by an amicus. Nor do they explain the failure of plaintiffs and amicus to request permission to file a supplemental brief in the Court of Appeal raising the new point of law. This court, overriding another Court of Appeal, has held under similar circumstances that the filing by a party of a supplemental brief provides "a satisfactory basis for the unusual practice of considering a point raised for the first time after the opening briefs have been filed." (*Meier* v. *Ross General Hospital* (1968) 69 Cal.2d 420, 423-424, fn. 1.)

Finally, the majority cite several decisions in which this court has held that a *party* may raise a new issue on appeal if it is strictly one of law, based on undisputed facts and involving important questions of public policy. (Maj. opn., *ante,* at pp. - fn. 3 [*Infra* at A-5 to A-6].) Again, they fail to explain why the same rule should apply to an amicus curiae. More importantly, they fail to address the ramifications of permitting new issues to be raised by nonparties *after* a hearing has been granted in this court.[1]

" ' "[T]he rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered [citations]." ' " *Younger* v. *State of California* (1982) 137 Cal.App.3d 806, 813-814; see *E.L. White, Inc.* v. *City of Huntington Beach* (1978) 21 Cal.3d 497, 510,511; *Eggert* v. *Pacific States S. & L. Co.* (1943) 57 Cal.App.2d 239, 251.)[2]

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[1] None of the cases cited by the majority involved an attempt by an amicus curiae to raise a new issue on appeal, nor does it appear that the new issues were first raised after a hearing had been granted. (*Frink* v. *Prod* (1982) 31 Cal.3d 166, 170; *Carman* v. *Alvord* (1982) 31 Cal.3d 318, 323; *UFITEC, S.A.* v. *Carter* (1977) 20 Cal.3d 238, 249, fn. 2; *Wong* v. *Di Grazia* (1963) 60 Cal.2d 525, 532, fn. 9, 535-541; *Tyre* v. *Aetna Life Ins. Co.* (1960) 54 Cal.2d 399, 405; *Burdette* v. *Rollefson Construction Co.* (1959) 52 Cal.2d 720, 725-726.)

In *Carman* v. *Alvord, supra,* 31 Cal.3d 318, several amici joined the parties in urging this court to resolve an issue first raised on appeal. (*Id.,* at p. 324.) However, the issue had been *raised* by the defendant city in its responsive brief in the Court of Appeal. (*Id.,* at p. 323.) This court concluded that the issue was properly before it under an exception to the rule that "on appeal a *litigant* may not argue theories for the first time [ ]." (*Id.,* at p. 324, emphasis added.)

[2] Several exceptions have been recognized, none of which is applicable in the setting of the present case. (See *E. L. White, Inc.* v. *City of Huntington Beach, supra,* 21 Cal.3d at p. 511 [issue raised by amicus curiae considered because, on appeal from a judgment of dismissal following the sustaining of a general demurrer without leave to amend, court was required to affirm judgment if correct on any theory; appeal also presented a question of jurisdictional dimension]; cf. *People* v. *Coleman* (1942) 53 Cal.App.2d 18, 32 ["ignoring" general rule to permit amicus curiae to raise new objection to jury instructions in criminal appeal].)

(Footnotes continued on following page)

In *Younger*, the appellant attempted in his reply brief in the Court of Appeal to adopt as his own an issue first presented by an amicus curiae. The Court of Appeal refused to address the issue, reasoning that amicus had no standing to raise it and that the appellant had failed to show good reason for his failure to present the point in his opening brief. (*Younger* v. *State of California*, *supra*, 137 Cal.App.3d at pp. 812-814.)

The present case presents striking similarities. While plaintiffs cannot be faulted for failing to raise the antitrust issues in their opening brief in the Court of Appeal, their failure to raise them in a supplemental brief or in oral argument is unexcused. Nor do they explain their failure to raise the point in the answer to the petition for hearing, even though the legal grounds for doing so had by then existed for nearly two years.

On the basis of the arguments presented in the petition and the answer, this court voted to grant a hearing. Subsequently, amicus curiae requested leave to file its brief presenting the antitrust issues. Only then did plaintiffs jump on the bandwagon. By that time, of course, it was too late for the court to consider the possible bearing of the additional issues on its determination whether or not to grant a hearing.[3]

(Footnotes continued from preceding page)

Another exception is presented by an automatic appeal from a judgment imposing a penalty of death. In an automatic appeal, this court has a statutory duty to examine the complete record to determine whether the defendant was given a fair trial. (*People* v. *Stanworth* (1969) 71 Cal.2d 820, 833; Pen. Code, § 1239, subd. (b).) Accordingly, an amicus will be permitted to raise a new issue bearing on that question. (People v. Easley (1983) 34 Cal.3d 858, 863-864 [rehearing granted to consider issues raised by amicus curiae after initial decision filed but before the opinion became final].)

[3] In this respect, the problem presented here differs from the one confronting the Court of Appeal in *Younger*. With certain exceptions, this court has discretion as to which cases it will hear. The Courts of Appeal, again with minor exceptions, must rule on all duly filed appeals from final judgments and appealable orders. (See Cal. Const., art. VI, §§ 11, 12; Cal. Rules of Court, rules 28, 29; Code Civ. Proc., § 901 et seq.; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 30, p. 4045.) Hence, this court has an additional basis for insisting upon timely notification of the issues posed by an appeal.

I do not know, of course, whether the vote on the petition for hearing in the present case might have been different had the court been apprised that additional issues were lurking in the shadows. However, I submit that in many cases the decision to grant or deny hearing might be heavily influenced by the court's awareness or lack of awareness of such issues—and rightly so.

This court grants only a small percentage of the petitions for hearing filed each year. Petitioners faced with that fact naturally make every attempt to present the issues posed in their appeal in the most favorable light. Troublesome or time consuming secondary issues which were argued in the courts below may be deemphasized or omitted entirely from the petition for hearing. The court is able in these instances to review the briefs filed in the Court of Appeal and the lower court's opinion to identify such hidden issues and consider them in deciding whether a hearing is advisable.[4]

Where, as here, an issue that could have been raised in the Court of Appeal is not raised until after that court has filed its opnion and after a hearing has been granted, this court is hindered in two important ways from performing its responsibilities most effectively. First, the court is denied the opportunity to consider whether hearing should be denied in light of the additional issue. Second, assuming that a hearing would have been granted in any event, the court is deprived of the lower court's views on the issue.

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[4] On May 6, 1985, this particular problem will be lessened considerably when a recently approved amendment to the California Constitution takes effect. (Cal. Const., art. VI, § 12, as adopted Nov. 6, 1984.) The amendment will permit this court, inter alia, to review only those issues which it considers most important in a case and leave intact the lower court's decision on all other issues. (See Legislative Analyst's Analysis, Ballot Pamp., Proposed Amend. to Cal. Const., Supreme Court: Transfer of Causes and Review of Decisions, Gen. Elec. (Nov. 6, 1984) p. 28.)

Accordingly, both parties and amici[5] should bear a heavy burden in this court when they attempt, after a hearing has been granted, to raise an issue which they could have raised earlier. The burden should be especially great where the issue could have been raised before the decision of the Court of Appeal became final as to that court. In all but the rarest cases, this court should refuse to consider a new issue that has been raised in such a belated manner. Otherwise, amici control the issues this court considers and decides—a most curious method of appellate review.

BIRD, C. J.

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[5] The burden of satisfying the requirements for timely presentation of issues should be added to that of overcoming the well established general rule which bars amici from raising new issues on appeal. (See *ante*, at p. [*Infra* at A-77].)

DISSENTING OPINION BY LUCAS, J.

I respectfully dissent.

In my view, and without considering any of the other substantial objections raised by plaintiff landlords, the Berkeley rent control ordinance is invalid because it calls for the fixing of maximum rents in violation of federal antitrust law (Sherman Antitrust Act, 15 U.S.C. § 1). Indeed, the ordinance would appear to constitute a per se illegal price-fixing scheme routinely condemned by the federal courts. Accordingly, we should declare the ordinance a *nullity*, as mandated by the supremacy clause of the United States Constitution. (Art. VI, § 2.)

As I will demonstrate, a municipality's participation in, or approval of, a price-fixing scheme should not shield it from antitrust scrutiny. If such a scheme indeed constitutes a per se violation of the Sherman Antitrust Act, then an irreconcilable conflict exists between the municipal ordinance and federal antitrust policy which voids the ordinance under supremacy principles. (See *Rice* v. *Norman Williams Co.* (1982) 458 U.S. 654, 659-661.) Such a conflict is presented here.

I. Antitrust Scrutiny of Municipal Activity: the Background

Not every state or local governmental activity having anticompetitive effects is invalid under the Sherman Antitrust Act. Thus in *Parker* v. *Brown* (1943) 317 U.S. 341, the United States Supreme Court held that the federal antitrust laws do not preclude anticompetitive programs adopted and enforced *by the states* as a matter of state policy. (*Id.*, at pp. 351-352.) This "state action" exemption does not extend, however, to a state's local political subdivisions (such as Berkeley) unless the state has "clearly articulated and affirmatively expressed" the anticompetitive policy being implemented by the local entity.

(*Community Communications Co.* v. *City of Boulder* (1982) 455 U.S. 40, 54 [hereafter *Boulder*]; see also *Lafayette* v. *Louisiana Power & Light Co.* (1978) 435 U.S. 389, 410 [plurality opn.].) In short, as *Boulder* established, cities, like private entities, " 'Must obey the antitrust laws.' " (455 U.S. at p. 57, quoting the *Lafayette* plurality.)

It is uncontradicted that the California Legislature has not directly spoken on the subject of rent control, much less "clearly articulated and affirmatively expressed" any policy favoring local ordinances such as Berkeley's. Defendants assert that the requisite "state policy" is evidence by legislation calling upon local governments to assist in providing a "decent home and suitable living environment for every California family." (Health & Saf. Code, §§ 50003, 50005.) The Legislature has expressly qualified that state policy, however, by declaring that nothing in the division which contains the foregoing provisions "shall authorize the imposition of rent regulations or controls" (with exceptions not applicable here). (*Id.*, § 50202.) Similarly, the "local planning" policy of the state (Gov. Code, §§ 65100-65761) provides that "[n]othing in this article shall be construed to be a grant of or a repeal of any authority which may exist of a local government to impose rent controls . . . ." (*Id.*, § 65589, subd. (b).) Such neutrality on the part of the state is plainly insufficient to insulate Berkeley's ordinance from antitrust scrutiny. (*Boulder*, supra, 455 U.S. at p. 55.)

II. Antitrust Scrutiny of Berkeley's Ordinance

The Berkeley rent control ordinance is *unquestionably* an anticompetitive price-fixing scheme—it imposes maximum ceilings on rents charged by private landlords. And had Berkeley's landlords privately agreed to fix maximum rents, their scheme would have been severely and speedily punished, for maximum pricing by private entities has been consistently condemned as *per se illegal* under the so-called "per se" price-fixing rule. (*Arizona* v. *Maricopa County Medical Society* (1982) 457 U.S. 332 [hereafter *Maricopa*]; *Albrecht* v. *Herald Co.* (1968) 390 U.S. 145; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.* (1951) 340 U.S. 211.) Does it make a difference that the price-fixing scheme attacked here is municipally sponsored?

Some cases indicate that, in determining whether to apply the "per se illegal" label to a particular restraint or scheme, we should undertake a limited inquiry into the "pernicious effects" and "redeeming virtues," if any, inherent in the challenged program. (*Continental T.V., Inc.* v. *GTE Sylvania Inc.* (1977) 433 U.S. 36, 50; *Northern Pac. R. Co.* v. *United States* (1958) 365 U.S. 1, 5; see also *Broadcast Music Inc.* v. *Columbia Broadcasting System, Inc.* (1979) 441 U.S. 1, 19-20.) Other cases seem to support the idea that such an inquiry is unnecessary where a maximum price-fixing scheme is involved. (See generally *Maricopa,* supra [per se rule applied to invalidate maximum pricing arrangement in health care plan].) In any event, as I explain, Berkeley's rent control ordinance clearly has "pernicious" anticompetitive effects without any overriding "redeeming virtues."

a. Anticompetitive effects

Economists are virtually unanimous in their condemnation of rent control laws. (E.g., Baird, *Rent Control: The Perennial Folly* (1980) pp. 54-78; *Rent Control, A Popular Paradox* (The Fraser Institute edit. 1975) [essays by nine economists]; Muth, *Redistribution Income Through Regulation in Housing* (1983) 32 Emory L.J. 691, 698; see also Rabin, *The Revolution in Residential Landlord-Tenant Law* (1984) 69 Cornell L.Rev. 517, 555 [quoting Ludwig von Mises' conclusion that governmental attempts to fix the price of a commodity make conditions worse].) In the view of most of these economists, rent control schemes cause what a Supreme Court plurality has called "serious economic dislocation." (See *Lafayette*, supra, 435 U.S. at pp. 412-413.)

For example, Professor Milton Friedman, writing in collaboration with Professor George Stigler, observed that "Rent ceilings, therefore, cause haphazard and arbitrary allocation of space, inefficient use of space, retardation of new construction and indefinite continuance of rent ceilings, or subsidisation of new construction and a future depression in residential building. Formal rationing by public authority would probably make matters worse." (Friedman & Stigler, *Roofs or Ceilings? The Current Housing Problem,* in *Rent Control, A Popular Paradox,* supra, p. 100.)

In addition, rent control measures bring about the very evils that have prompted the United States Supreme Court's condemnation of private maximum-price arrangements. Rent control laws cripple the economic freedom of landlords and thereby restrain their ability to sell housing in accordance with their own best judgment exercised in light of market conditions. (See *Kiefer-Stewart*, supra, 340 U.S. at p. 312.) Moreover, maximum rents may be fixed too low to encourage, or even permit, landlords to furnish services or facilities deemed necessary or desirable by their tenants. (See *Albrecht*, supra, 390 U.S. at pp. 152-153.) Where is the competitive incentive under a rent control scheme?

As previously indicated, just as maximum pricing of goods and services generally discourages entry into the market (see *Maricopa*, supra, 457 U.S. at p. 348), maximum rents have a negative impact on the production of new housing (Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws* (1984) 69 Cornell L.Rev. 604, 609-610; Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, supra, 32 Emory L.J. 721, 723), thereby inevitably putting an upward pressure on price as demand increases. In sum, the pernicious effects on the competitive market are many, apparent, and long-standing.

B. Redeeming Virtues

Does rent control have any "redeeming virtues" which would override its anticompetitive effects? Berkeley points to alleged public welfare features which supposedly justify rent control. As I indicated above, if landlords privately agreed to fix maximum rents, their scheme *unquestionably* would be struck down as per se illegal despite asserted socially "redeeming" features, such as, for example, the financial boon to their tenants. In the private sphere, "redemption" is limited to a showing of offsetting procompetitive gains—effects on *competition* are the sole and governing consideration in such cases. (*National Society of Prof. Engineers* v. *United States* (1978) 435 U.S. 679, 690-696; see also *Continental T.V.*, supra, 433 U.S. at pp. 57-58.) Does it make a difference that a city, rather than a landlord, is claiming redeeming features unrelated to competition? I certainly can see no logic in such a proposition.

To allow a local governmental entity to excuse a price-fixing scheme on the basis of asserted public health, safety or welfare considerations would enmesh the courts in an impossible task of weighing the "apples" of social welfare with the "oranges" of antitrust policy. (See *Boulder*, supra, 455 U.S. at p. 67 [dis. opn. of Rehnquist, J.].)

Municipalities very well may be able to justify their anticompetitive programs under certain limited circumstances not involved here. Perhaps a city can point to a factor such as the existence of a "natural monopoly" (e.g., a unique resource such as a natural harbor) which requires price regulation. (See 3 Areeda & Turner, Antitrust Law (1978) ¶ 621b, at pp. 50-51; see also *Omega Satellite Prods. Co.* v. *City of Indianapolis* (7th Cir. 1982) 694 F.2d 119, 127 [natural monopoly in cable television].) Other justifications doubtless exist. But dissatisfaction with the price level attained through lawful and open competition, i.e., through the normal operation of the free enterprise system, cannot justify anticompetitive price restraints of the kind imposed here. Otherwise, there would exist no practical limits whatever on the authority of a municipality to tamper with the price structure established by the open market.

Price competition is the "central nervous system of the [free market] economy." (*United States* v. *SoconyVacuum Oil Co.* (1940) 310 U.S. 150, 226, fn. 59.) Price fixing, whether privately or publicly inspired, thus endangers the free economic system to which Congress has entrusted the prosperity of the entire nation. If our 38,500 county, municipal and township governments (Bureau of the Census, Statistical Abstract of the United States (1984) at p. 294) with their broad authority for general governance "were free to make economic choices . . . without regard to their anticompetitive effects, a serious chink in the armour of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." (*Lafayette*, supra, 435 U.S. at p. 408 [plurality opn., fn. omitted].)

In my view, then, the City of Berkeley's belief that, in essence, rents were too "high" in relation to the city's tenants' ability to pay would not constitute an excuse for tampering with

the free market mechanism, nor would the resultant decreased rents amount to a "redeeming virtue" overriding the anticompetitive effects of rent control. Accordingly, the ordinance was per se illegal under the Sherman Antitrust Act and should be declared invalid on that basis.

III. The Majority's Four-Part Test

Although the challenged ordinance contemplates a per se illegal price-fixing scheme under the foregoing analysis, I observe that its invalidity would be apparent even under the majority's own novel test, an approach involving a "more accommodating standard" than the per se rule would require. (*Ante*, p. ____ [*Infra* at A-21].)

The majority acknowledges that Berkeley's ordinance would be unacceptable if "equally effective" and "less intrusive" alternative means were available to accomplish the same result. (*Ante*, p. ____ [*Infra* at A-35].) Yet isn't it evident that such alternative means indeed exist? If the city fathers (and mothers) believe that rents are too high in Berkeley, several solutions come to mind which would be more consistent with the operation of the free market system. *Rent subsidies* may be provided to needy tenants. *Public housing projects* may afford additional rental units. Property may be municipally acquired through *negotiated purchase or condemnation*. (See, e.g., Gov. Code, §§ 37350 [city may purchase and hold real property for common benefit]; 37350.5 [eminent domain]; Health & Saf. Code, §§ 50735-50743 [programs for low-income rental housing].)

In short, given the foregoing alternatives, why should competition between Berkeley's landlords be stifled in order to provide for the social welfare of Berkeley's tenants? Surely the "less intrusive," and "equally effective" method of accomplishing this end would be to spread the financial burden among *all* city taxpayers.

IV. Conclusion

The federal antitrust laws have been called the Magna Carta of the free market system. (*United States* v. *Topco Associates, Inc.* (1972) 405 U.S. 596, 610.) These laws are as important to the preservation of market freedom as the Bill of Rights is to the protection of individual liberties. (*Ibid.*) Consistent with the overriding principle of supremacy of federal law (U.S. Const., art. VI, § 2), we should declare null and void the Berkeley rent control law at issue here.[1]

I would reverse the judgment and remand the case for further proceedings addressed to the antitrust issue.[2]

LUCAS, J.

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[1] Plaintiffs herein seek a declaratory judgment and injunctive relief to enjoin operation of the ordinance. Although the issue of available remedies in a federal court action was left open in *Boulder*, supra, 457 U.S. at page 56, footnote 20, I assume that relief in state court cases such as this is limited to declaratory and injunctive relief and would preclude recovery of damages. (see *Rice* v. *Norman Williams, Co.*, supra, 458 U.S. at p. 658, fn.4.)

[2] Application of the antitrust laws requires factual and legal determinations regarding the existence of "concerted activity" and a substantial effect upon interstate commerce. Although my view of the record suggests that both elements exist here, I would not object to a remand limited to these issues.

FILED
OCT 24 1983
Court of Appeal—First App. Dist.
CLIFFORD C. PORTER, Clerk
By ..... DEPUTY

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

ALEXANDRA FISHER et al.,
Plaintiffs and Appellants,
v.
THE CITY OF BERKELEY et al.,
Defendants and Respondents.

A010460
1 Civ. 52332
Sup.Ct.No. 536602-6

In this case we hold that a rent control ordinance is unconstitutional because of inherent procedural delays in rent adjustment when it precludes consideration of the rate of return to the landlord in authorizing general adjustments in rent ceilings and requires an individual petition for this factor to be considered. This results in an inexcusably cumbersome rent adjustment procedure not reasonably related to the ordinance's stated purposes of preventing unwarranted rent increases and therefore deprives landlords of due process of law. We also hold that the subject of the rights of tenants to withhold rent is preempted by state law.

Appellants (landlords) filed a complaint for injunctive and declaratory relief against the City of Berkeley, the Berkeley City Council, and the Berkeley Rent Stabilization Board (Berkeley), challenging the validity of the Berkeley "Ordinance Adopting a Rent Stabilization and Eviction for Good Cause Program" (hereafter "Measure D") enacted by initiative on June 3, 1980. The complaint alleged that Measure D was invalid both on its face and as applied to landlords.

Measure D is a comprehensive rent control ordinance affecting some 28,000 Berkeley rental units. It creates a Rent Stabilization Board (Board), requires that landlords register each rental unit and pay an annual registration fee (upon which the Board is solely dependent for funding), establishes base rent ceilings, provides for annual general adjustments and individual adjustments of rent ceilings, prohibits evictions except upon good cause, and prescribes remedies for violations of its provisions.

The trial court granted Berkeley's motion for judgment on the pleadings, declaring Measure D to be valid both on its face and as applied. The court rendered judgment without leave to amend as to the claim of facial invalidity, but granted landlords thirty days leave to amend as to the claim that the ordinance was invalid as applied. Landlords filed an amended complaint, but subsequently dismissed it voluntarily. Our decision, therefore, is limited to the landlords' claim that Measure D is facially invalid and we do not consider the claim that the measure is invalid as applied.

The parties have briefed and argued the validity of several separate provisions of Measure D. The primary dispute is whether a rent control ordinance is constitutional if it provides a landlord is to receive a "fair return on investment" rather than a reasonable return on the value of the property. In *Cotati Alliance for Better Housing* v. *City of Cotati, post,* page 280, we have determined that a return on investment standard is not unconstitutional. It is therefore unnecessary to discuss this issue here. We limit our consideration of Measure D to the other issues presented.

The first contention we consider is landlords' challenge to subdivisions (d) and (e) of section 12 of Measure D. Those provisions preclude the Rent Stabilization Board from authorizing an individual rent incease because of increased interest or other expenses resulting from sale or refinancing of rental property if the landlord could reasonably have foreseen that such increased expenses could not be covered by the existing rent schedule (except where refinancing is necessary to make capital improvements or in cases of individual hardship to

buyers).[1] Landlords contend these provisions constitute unreasonable restraints on alienation (i.e., will inhibit sales at a fair market value) in violation of Civil Code section 711, which declares that "Conditions restraining alienation, when repugnant to the interest created, are void."

Landlords' argument ignores subdivision (i) of section 12, which provides that "No provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment." This safety valve overrides all other provisions of the ordinance and averts any danger that subdivisions (d) and (e) might prevent a purchaser from realizing a fair return, and thus prevents any unreasonable restraint on alienation. (See generally *Wellenkamp* v. *Bank of America* (1978) 21 Cal.3d 943, 948.)

More to the point, Civil Code section 711 does not apply to municipal ordinances. The rule against restraints on alienation "is directed against provisions in contracts or conveyances. It has no application to disabling restraints established by express statute or by the operation of rules of law; e.g., the incapacity of a minor or insane person to transfer land, or restrictions on the power of a trustee." (3 Witkin, Summary of Cal. Law (8th ed.

[1] Subdivisions (d) and (e) of section 12 provide in full:

d. No individual upward adjustment of a rent ceiling shall be authorized by the Board by reason of increased interest or other expenses resulting from the landlord's refinancing the rental unit if, at the time the landlord refinanced, the landlord could reasonably have foreseen that such increased expenses could not be covered by the rent schedule then in existence, except where such refinancing is necessary for the landlord to make capital improvements which meet the criteria set forth in Section 12.c.(3). This paragraph shall only apply to that portion of the increased expenses resulting from the refinancing that were reasonably foreseeable at the time of the refinancing of the rental unit and shall only apply to rental units refinanced after the date of adoption of this Ordinance.

e. Except for cases of individual hardship as set forth in Subsection 12.i of this Ordinance, no individual upward adjustment of a rent ceiling shall be authorized by the Board because of the landlord's increased interest or other expenses resulting from the sale of the property, if at the time the landlord acquired the property, the landlord could have reasonably foreseen that such increased expenses would not be covered by the rent schedule then in effect. This Subsection (12.e) shall only apply to rental units acquired after the date of adoption of this Ordinance.

1973) Real Property, § 314, p. 2024; accord, 4 Rest. Property, pp. 2377, 2381.) Thus Measure D cannot violate Civil Code section 711.

Landlords assert an equal protection challenge to section 5, subdivision (f), of Measure D. When Measure D was passed, this provision exempted from the ordinance's application "Rental units in a residential property which is divided into a maximum of four (4) units where one of such units is occupied by the landlord as his/her principal residence," but limited the exemption to "rental units that would have been exempt under the provisions of this Ordinance had this Ordinance been in effect on December 31, 1979."[2] Landlords challenge subdivision (f) to the extent that it excludes from the exemption any property that became owner-occupied after December 31, 1979.

As Berkeley points out, however, the challenged exclusion bears a debatable rational relationship to the purposes of Measure D. The Berkeley electorate could reasonably have determined that the exclusion was desirable to prevent certain landlords from avoiding application of Measure D by evicting tenants and moving into their rental property after the provisions of the proposed ordinance became known. Landlords argue that any landlords so disposed would already have taken such measures, since rental property of four or less units was already exempt from rent control by the terms of a prior ordinance (the "Temporary Rent Stabilization Ordinance," passed by the Berkeley City Council effective December 30, 1979), but this response ignores the fact that Measure D was far more comprehensive than its predecessor. Because the challenged distinction is supported by a debatable rational basis, the equal protection challenge must be rejected. (*Minnesota* v. *Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 464; *New Orleans* v. *Dukes* (1975) 427 U.S. 297, 303; *Hale* v. *Morgan* (1978) 22 Cal.3d 388, 395.)

[2] This subdivision was amended by the Berkeley "Tenants Rights Amendment Act of 1982" to limit the exemption to rental property divided into two units.

Landlords challenge certain portions of section 14 of Measure D. Section 14 prohibits retaliation against a tenant for the assertion or exercise of rights under the ordinance. The challenged provisions, when enacted, stated that in an action by the landlord to recover possession or in an affirmative action taken by the tenant for damages, "evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged acts of retaliation shall create a presumption that the landlord's act was retaliatory. 'Presumption' means that the Court must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." Subsequent to the trial court's judgment in this case the latter sentence was amended by the Berkeley "Tenants Rights Amendment Act of 1982" to read, " 'Presumption' means that the Court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence."

Landlords contend that the pre-amendment presumption was a presumption affecting the burden of proof, and as such was preempted by the Evidence Code. Berkeley claims there was no preemption because the presumption was one affecting the burden of producing evidence.

As previously indicated, only the facial validity of Measure D is challenged. The 1982 modification of section 14 renders the issue as to the validity of the former presumption moot. (*Callie* v. *Board of Supervisors* (11969) 1 Cal.App.3d 13, 18; *Jordan* v. *County of Los Angeles* (1968) 267 Cal.App.2d 794, 799; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 466, p. 4421.) The 1982 amendment changing the challenged presumption to one affecting the burden of proof may be preempted by state law, but this issue is not presently before us.

Landlords claim it was procedurally improper for the court to grant judgment on the pleadings, because this denied them the opportunity to present evidence as to their claims of confiscation, denial of equal protection, and unlawful restraint on alienation. This argument lacks merit. On a defense motion for judgment on the pleadings, all facts alleged in the complaint are deemed admitted. (*Sullivan* v. *County of Los Angeles*

(1974) 12 cal.3d 710, 714-715 fn. 3; *Colberg, Inc.* v. *State of California ex rel. Dept of Pub. Wks.* (1967) 67 Cal.2d 408, 411-412, cert. den. (1968) 390 U.S. 949.) There was no need for landlords to present any evidence. Landlords claim that judgment on the pleadings denied them a declaration as to facial invalidity, but the judgment expressly declared that Measure D is "valid on its face." It is well established that a motion for judgment on the pleadings "may be used in an action for declaratory relief to obtain a *declaratory judgment on the merits in favor of the defendant* rather than a dismissal of the plaintiff's suit." (4 Witkin, Cal. Procedure (2d ed. 1971), Proceedings Without Trials, § 161, p. 2817 (emphasis in original.) Landlords claim they should have been granted leave to amend their complaint, but any amendment to make further factual allegatous would only be applicable to the claim that the ordinance was invalid *as applied.* Landlords were granted leave to amend as to this claim (although they later dismissed the amended complaint).

We note for the record that as a result of discussion at oral argument of a point not discussed in the briefs, we vacated submission in this case in order to receive Berkeley's concession that the term "fair return on investment" in sections 12(c) and 12(i) (pertaining to individual rent adjustments) may reasonably be interpreted to permit the Board to consider and allow for any decrease in the purchasing power of the return due to inflation. As landlords stated in reply to that concession, "Although demonstrating the city's recognition of a serious defect in the Ordinance, the concession does nothing to correct it. The Ordinance freezes rents (and thus returns) at their May 1980 levels and contains no adequate procedural mechanism whereby landlords can obtain rent adjustments to offset losses due to inflation." Landlords' comments are well taken.

Measure D contains two methods by which rent ceilings can be adjusted. In section 11, providing for annual general adjustments of rent ceilings, Measure D precludes the Board from granting citywide rent increases except to offset certain

increases in costs.[3] Because of this prohibition within the ordinance, despite Berkeley's concession, the Board in making general adjustments does not have the power to consider factors (e.g., inflation) affecting the landlords' return on investment such as we discussed in our decision in *Cotati Alliance for Better Housing* v. *City of Cotati, post,* pages 294-296.

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[3] Section 11 provides in full:

(a) Once each year, the Board shall consider setting and adjusting the rent ceiling for all rental units covered by this Ordinance in general and/or particular categories of rental units covered by this Ordinance deemed appropriate by the Board. The Board shall hold at least two public hearings prior to making any annual general adjustment of the rent ceilings. The first such public hearing shall be conducted no later than October 31, 1980, and the first annual general adjustment shall be made no later than December 31, 1980.

(b) In making annual general adjustments of the rent ceiling, the Board shall:

(1) Adjust the rent ceiling upward by granting those landlords who pay for utilities a utility adjustment for increases in the City of Berkeley for utilities.

(2) Adjust the rent ceiling upward by granting landlords a property tax, maintenance and operating expenses increase adjustment (exclusive of utilities) for increases in the City of Berkeley for property taxes and maintenance and operating expenses.

(3) Adjust the rent ceiling downward by requiring landlords to decrease rents for any decreases in the City of Berkeley for property taxes.

In adjusting rent under this subsection, the Board shall adopt a formula or formulas of general application. This formula will be based upon a survey or other available data indicating increases or decreases in the expenses in the City of Berkeley set forth in this subsection. For maintenance and operating expense adjustments, the Board may also use survey data from surrounding communities where appropriately the Board shall make no more than one annual adjustment of rent ceilings per rental units per year.

(c) An upward general adjustment in rent ceilings does not automatically provide for a rent increase. Allowable rent increases pursuant to a general upward adjustment shall become effective only after the landlord gives the tenant at least a thirty (30) days written notice of such rent increases and the notice period expires.

(d) If the Board makes a downward general adjustment in the rent ceilings, landlords of rental units to which this adjustment applies shall give tenants of such rental units written notice of the rent decrease to which they are entitled. Such rent decreases shall take effect not later than thirty (30) days after the effective date set by the Board for the downward general adjustment.

(Footnotes continued on following page)

The other method by which rent ceilings may be adjusted is provided by section 12 of Measure D, which provides for individual petitions for adjustment of rent ceilings. In setting forth the factors to be considered by the Board in acting upon such individual petitions, Measure D specifically provides that among the factors to be considered is the "landlord's rate of return on investment."[4]

(Footnotes continued from preceding page)

(e) If the maximum allowable rent specified under this Ordinance for a rental unit is greater than the rent specified for such unit in the rental agreement, the lower rent specified in the rental agreement shall be the maximum allowable rent until the rental agreement expires. If the maximum allowable rent specified under this Ordinance for a rental unit is less than the rent specified for such unit in the rental agreement, the lower rent specified under this Ordinance shall be the maximum allowable rent.

(f) No rent increase pursuant to an upward general adjustment of a rent ceiling shall be effective if the landlord:

(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and or orders or regulations issued thereunder, or

(2) Has failed to bring the rental unit into compliance with the implied warranty of habitability.

[4] Section 12, subdivision (c), provides in full:

"In making individual adjustments of the rent ceiling, the Board or the hearing examiner shall consider the purposes of this Ordinance and shall specifically consider all relevant factors, including (but not limited to):

(1) Increases or decreases in property taxes;

(2) Unavoidable increases or any decreases in maintenance and operating expenses;

(3) The cost of planned or completed capital improvements to the rental unit (as distinguished from ordinary repair, replacement and maintenance) where such capital improvements are necessary to bring the property into compliance or maintain compliance with applicable local code requirements affecting health and safety, and where such capital improvements costs are properly amortized over the life of the improvement;

(4) Increases or decreases in the number of tenants occupying the rental unit, living space, furniture, furnishings, equipment, or other housing services provided, or occupancy rules,

(5) Substantial deterioration of the controlled rental unit other than as a result of normal wear and tear;

(6) Failure on the part of the landlord to provide adequate housing services, or to comply substantially with applicable state rental housing laws, local housing, health and safety codes, or the rental agreement;

(7) The pattern of recent rent increases or decreases;

(Footnotes continued on following page)

Thus to obtain a rent adjustment and have any consideration given to the effects of inflation on the landlords' rate of return on investment, there must be a petition by each landlord on an individual basis. Such a procedure for adjusting maximum rents is "constitutionally insufficient to relieve landlords from confiscatory rent levels . . ." (*Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129, 167.)

The requirement of an individual petition to ameliorate the effects of inflation is the same type of requirement upon which the court in *Birkenfeld* held unconstitutional a predecessor Berkeley rental control ordinance requiring "drastically and unnecessarily restricts the rent control board's power to adjust rents, thereby making inevitable the arbitrary imposition of unreasonably low rent ceilings. It is clear that if the base rent for all controlled units were to remain as the maximum rent for an indefinite period many or most rent ceilings would be or become confiscatory. For such rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for . . . situations in which the base rent cannot reasonably be deemed to reflect general market conditions. The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary. 'Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them . . .' (*Smith* v. *Illinois Bell Tel. Co.* (1926) 270 U.S. 587, 591 [70 L.Ed. 747,

(Footnotes continued from preceding page)

(8) The landlord's rate of return on investment. In determining such return, all relevant factors, including but not limited to the following shall be considered: the landlord's actual cash down payment method of financing the property, and any federal or state tax benefits accruing to landlord as a result of ownership of the property;

(9) Whether or not the property was acquired or is held as a long-term or short-term investment; and

(10) Whether or not the landlord has received rent in violation of the terms of this Ordinance or has otherwise failed to comply with the Ordinance.

It is the intent of this Ordinance that individual upward adjustments in the rent ceilings on units be made only when the landlord demonstrates that such adjustments are necessary to provide the landlord with a fair return on investment.

749, 46 S.Ct. 408] (enjoining enforcement of telephone rates because of unreasonable delay in acting upon application for rate increase.).) The charter amendment is constitutionally deficient in that it withholds powers by which the rent control board could adjust maximum rents without unreasonable delays and instead require the Board to follow an adjustment procedure which would make such delays inevitable." (*Birkenfeld* v. *City of Berkeley, supra,* 17 Cal.3d at p. 169.) The same is true here: Measure D is deficient in that it withholds powers by which the Board could adjust rents without unreasonable delay to account for inflation.

As a result, "regardless of how inequitable any rent ceiling may be under all of the circumstances, it cannot be adjusted except by a procedure that inherently and unnecessarily precludes reasonable prompt action except perhaps for a lucky few. [¶] . . . The delays in rent adjustment with which we are concerned stem not from any anticipated dereliction of duty on the part of the rent control board, but from defects in the charter amendment itself." (*Id.*, at p. 172.)

We hold that "the inexcusably cumbersome rent adjustment procedure is not reasonably related to the amendment's stated purpose of preventing excessive rents and so would deprive plaintiff landlords of due process of law if permitted to take effect." (*Id.*, at p. 173.) Thus, for reasons identical to those expressed by the Supreme Court in *Birkenfeld* in invalidating the predecessor Berkeley rent control ordinance, we find Measure D to be invalid on its face, not because of its objectives, but because the procedures impose heavy burdens upon landlords not reasonably related to the accomplishment of its objectives.

The purpose of rent control must be to assure fair treatment of both tenants and landlords. In our free enterprise system, the landlord should not be responsible for subsidizing rents to the extent that expenses cannot be recovered and a fair and reasonable profit cannot be received. Although Measure D would permit harm caused by inflation to be addressed by individual petitions to the Board, it suffers from the same deficiencies as its predecessor in that delays in considering and

acting upon individual petitions would inevitably cause delays in providing a fair return to the landlord and would therefore be confiscatory.[5]

We now turn to landlords' final contention, challenging the provisions of section 15, subdivisions (a)(1) and (a)(2), which allow a tenant, either upon Board authorization (subdivision (a)(1)) or on the tenant's own initiative and belief (subdivision (a)(2)) to withhold all or part of the rent if the landlord charges excessive rents or fails to register the unit, until compliance with the ordinance is achieved.[6] Landlords contend that the rent withholding provisions are preempted by state law.[7]

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[5] It is conceivable that the filing fee charged for individual petitions, in circumstances where a factor such as insufficient rate of return on investment is common to all landlords, might itself be prohibitive and therefore unconstitutional.

[6] Subdivision (a) of section 15 provides in pertinent part:

a. *For violation of Rent Ceilings or Failure to Register.* If a landlord fails to register in accordance with section 8 of this Ordinance, or if a landlord demands, accepts, receives or retains any payment in excess of the maximum allowable rent permitted by this Ordinance, a tenant may take any or all of the following actions until compliance is achieved:

(1) A tenant may petition the Board for appropriate relief. If the Board, after the landlord has proper notice and after a hearing, determines that a landlord has wilfully and knowingly failed to register a rental unit covered by this Ordinance or violated the provisions of Sections 10, 11 and 12 of this Ordinance, the Board may authorize the tenant of such rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is brought into compliance with this Ordinance. After a rental unit is brought into compliance, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not in compliance. Whether or not the Board allows such withholding, no landlord who has failed to comply with the Ordinance shall at any time increase rents for a rental unit until such unit is brought into compliance.

(2) A tenant may withhold up to the full amount of his or her periodic rent which is charged or demanded by the landlord under the provisions of this Ordinance. In any action to recover possession based on nonpayment of rent, possession shall not be granted where the tenant has withheld rent in good faith under this Section . . . .

[7] Berkeley contends that the challenge to subdivision (a)(2) is not justiciable because that provision involves only tenant action and no tenants were named as defendants here. But in an action for declaratory relief the court can consider "other problems" which would otherwise have required a different type of pleading (*Mackay* v. *Whitaker* (1953) 116 Cal.App. 2d 504, 509-510) in order to avoid piecemeal litigation (*Beeler* v. *Plastic Stamping,*

(Footnotes continued on following page)

The court in *Birkenfeld* v. *City of Berkeley, supra,* 17 Cal.3d at pp. 141-142, held that local regulation of amounts of rent payable is not preempted by state legislation. Landlords contend that, in contrast, state legislation pertaining to *when* rent is due preempts the withholding provisions of subdivisions (a)(1) and (a)(2) of section 15, by virtue of both direct statutory conflict and full occupation of the field. *Birkenfeld* did not deal with this issue.

We hold that the challenged provisions of section 15 are preempted by general laws intended fully to occupy the field of regulation as to when rent is due, to the exclusion of municipal regulation. In addition to Civil Code section 1947 which provides for the timing of the payment of rent if there is no usage or contract to the contrary, other state action has occurred in this area.[8] The Legislature has provided in Code of Civil Procedure section 1161 that a tenant is guilty of unlawful detainer when the tenant continues in possession "after default in the payment of rent." Even more to the point, in Civil Code section 1942 the Legislature has identified circumstances under which a tenant may withhold rent and utilize those funds to repair deficiencies rendering the premises untenable which the landlord has failed to repair. The Legislature specifically provided in section 1942 that this remedy would not be available to the tenant more than twice in any twelve month period and set forth the procedures under which this withholding of rent may be authorized.

Further, subdivision (d) of section 1942 provides that the withholding remedy "is in addition to any other remedy provided by this chapter, the rental agreement, or other appli-

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(Footnotes continued from preceding page)

Inc. (1956) 144 Cal.App. 2d 306, 309; *Byrd* v. *Mutual Benefit H. & A. Assn.* (1946) 73 Cal.App. 2d 457, 465). Further, the defendant City of Berkeley (through the electorate) granted tenants the unilateral right to withhold; any doubts as to the sufficiency of naming the city as a defendant—and hence the justiciability of the controversy—are to be resolved in favor of present adjudication. (See *California Water & Telephone Co.* v. *County of Los Angeles* (1967) 253 Cal.App. 2d 16, 26.)

[8] Civil Code section 1947 provides:

"When there is no usage or contract to the contrary rents are payable at the termination of the holding, when it does not exceed one year. If the holding is by the day, week, month, quarter, or year, rent is payable at termination of the respective periods, as it successfully becomes due."

cable statutory or common law," to the exclusion of municipal remedies. Thus in addition to contributing to a body of statutory law that we believe is intended fully to occupy the field of regulation as to when rent is due, the latter provision of section 1942 suggests a direct conflict with municipal ordinances permitting the withholding of rent.

For the foregoing reasons, the provisions of Measure D contained in section 15, subdivisions (a)(1) and (a)(2), allowing a tenant to withhold all or part of the rent, cannot be sustained.

Measure D contains a severability clause.[9] However, as the Supreme Court found in ruling that Berkeley's predecessor rent control ordinance was unconstitutional, "there appears no way of severing the invalid limitations on the Board's powers to adjust maximum rents from the remainder of the charter amendment. The constitutional defect cannot be cured simply by excision but only by additional provisions that are beyond our power to provide. (*Dillon* v. *Superior Court* (1971) 4 Cal.3d 860, 871 [94 Cal.Rptr. 777, 484 P.2d 945].)" (*Birkenfeld* v. *City of Berkeley, supra,* 17 Cal.3d at p. 173.)

The judgment is reversed.

King, J.

We concur:

Low, P. J.

Haning, J.

A010460/1 Civ. 52332

[9] Section 16 of the ordinance provides:
"If any provision of this Ordinance or application thereof is held to be invalid, this invalidity shall not effect other provisions or applications of this Ordinance which can be given effect without the invalid provisions or applications, and to this end the provisions and applications of this Ordinance are inseverable."

ENDORSED
FILED
AUGUST 21, 1980
RENE C. DAVIDSON, County Clerk
By Rhoda N. Payne, Deputy

APPENDIX C

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Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

ALEXANDRA FISHER, an individual;
MARGUERITE JACOBS, an individual;
MORT BAKER, an individual;
RICHARD LAWHORN, an individual;
ANTHONY KERSHAW, an individual
and LEVIN-ZEMEL, a corporation;
on behalf of themselves and
all others similarly situated;
Plaintiffs,

v.

THE CITY OF BERKELEY, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY RENT STABILIZATION BOARD;
DOES I through XX, inclusive,
Defendants.

NO. 536602-6

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

It appearing to the satisfaction of the court, upon the reading of the verified Complaint and declarations of plaintiffs, and the Points and Authorities submitted in support thereof, that the case therein presented is a proper case of issuance of an Order to Show Cause and a Temporary Restraining Order and that unless a Temporary Restraining Order issues plaintiffs will suffer irreparable injury before the matter can be heard on notice; now therefore:

IT IS HEREBY ORDERED that THE CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE CITY COUNCIL OF BERKELEY; and the BERKELEY RENT STABILIZATION BOARD appear on September 11, 1980, at 2 p.m., before this Court in Department 1, at the Courthouse, to show cause, if any they have, why a preliminary injunction should not issue restraining each of them and all persons acting on their behalf, from enforcing or attempting to enforce directly or indirectly, the Berkeley "Rent Stabilization And Eviction For Good Cause" Ordinance ("the Ordinance") in its entirety, or alternatively

(i) from enforcing sections 12(d), 12(e), 14, and 15;

(ii) from enforcing any part of the Ordinance with respect to buildings with 4 or less units one of which is owner-occupied; and

(iii) from enforcing or attempting to enforce the Ordinance, and particularly sections 12(c) and (i), in any way that denies owners rent increases necessary to provide a fair return on the equity (market value less secured indebtedness) in their property as of July 1, 1980.

IT IS FURTHER ORDERED that defendants and each of them, and all persons acting on their behalf be restrained pending the hearing of this Order to show Cause from:

(i) enforcing or attempting to enforce sections (a)(1) and (a)(2) of the ordinance;

DATED: August 21, 1980

ALLEN E. BROUSSARD

Judge of the Superior Court

ENDORSED
FILED
OCTOBER 9, 1980
RENE C. DAVIDSON, County Clerk
By Judy Burdick Deputy

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

ALEXANDRA FISHER, an individual et al.,

Plaintiffs,

v.

CITY OF BERKELEY, et al.,

Defendants.

No. 536 602 6
PRELIMINARY INJUNCTION

The application of plaintiffs for preliminary injunction came on regularly for hearing before the court on September 26, 1980 pursuant to an Order to Show Cause issued by this Court on August 21, 1980. Plaintiffs appeared by counsel James R. Parrinello, Esq.; defendants appeared by counsel Myron Moskovitz, Esq.

Good cause appearing therefore,

IT IS ORDERED that during the pendency of this action the defendants, and each of them, and their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be and they are hereby enjoined and restrained from enforcing or attempting to enforce, directly or indirectly, section 15(a)(2) of the Berkeley "Rent Stabiliza-

tion and Eviction for Good Cause" Ordinance. Except as otherwise stated herein, the application for preliminary injunction is denied.

The court reserves jurisdiction to modify this injunction as the ends of justice may require.

DATED: October 9, 1980

ALLEN E. BROUSSARD
JUDGE OF THE SUPERIOR COURT

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ALAMEDA

ALEXANDRA FISHER, an individual, et al.,
Plaintiffs,
v.
CITY OF BERKELEY, et al.,
Defendants.

No. 536 602 6
JUDGMENT ON THE PLEADINGS

[filed October 10, 1980]

The motion of Defendants City of Berkeley for judgment on the pleadings came on regularly for hearing, before the Court on October 6, 1980, the Honorable Donald P. McCullum, Judge presiding. Plaintiffs appeared by counsel James P. Parrinello, Esq.; Defendants appeared by counsel Myron Moskovitz, Esq. The matter having been orally argued and the Court having considered the pleadings, documents, and papers on file, the matter having been submitted for decision, and good cause appearing therefor

IT IS ORDERED, ADJUDGED AND DECREED:

1. That judgment on the pleadings in favor of Defendant City of Berkeley is granted as to the First Cause of Action for declaratory relief on the ground that said cause of action fails to state facts sufficient to state a cause of action, as Ordinance Measure D is Constitutional and valid on its face, and judgment is ordered without leave to amend.

2. That judgement on the pleadings in favor of Defendant City of Berkeley is granted as to the First Cause of Action for declaratory relief on the ground that said cause of action fails to state facts sufficient to state a cause of action, as Ordinance Measure D is Constitutional and valid as applied, and judgment is ordered with thirty days leave to amend.

3. The Court further declares that all parties are obligated to perform and comply with Ordinance Measure D as enacted.

4. That judgment on the pleadings in favor of Defendant City of Berkeley is granted as to the Third Cause of Action for an injunction against enforcement of Ordinance Measure D, and said preliminary injunction or temporary restraining order is vacated, dissolved and set aside, and judgment may be entered denying injunctive relief from enforcement of Ordinance Measure D.

5. That judgment on the pleadings in favor of Defendant City of Berkeley is granted as to the Third Cause of Action for injunction against waste of public funds, and any injunction or restraining orders are vacated, and judgment may be entered denying injunctive relief as prayed in the Third Cause of Action.

6. That judgment on the pleadings in favor of Defendant City of Berkeley is granted as to the Fourth Cause of Action for injunctive relief from enforcement of Ordinance Measure D until compliance with the California Environmental Quality Act, on the grounds that said cause of action fails to state facts sufficient to state a cause of action, and judgment is ordered without leave to amend.

Dated: October 6, 1980 and
Signed: October 10, 1980

DONALD P. McCULLUM
JUDGE OF THE SUPERIOR COURT

APPENDIX F

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALEXANDRA FISHER, an individual;
MARGUERITE JACOBS, an individual;
MORT BAKER, an individual;
RICHARD LAWHORN, an individual;
ANTHONY KERSHAW, an individual;
and LEVIN-ZEMEL, INC., a corporation
Plaintiffs and Appellants,

v.

THE CITY OF BERKELEY,
a municipal corporation,
THE BERKELEY CITY COUNCIL,
THE BERKELEY RENT STABILIZATION BOARD; DOES I through XX, inclusive,
Defendants and Appellees.

S.F. 24675
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[filed March 18, 1985]

NOTICE IS HEREBY GIVEN: That Alexandra Fisher, Marguerite Jacobs, Mort Baker, Richard Lawhorn, Anthony Kershaw, and Levin-Zemel, Inc., the plaintiffs and appellants herein, hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered on December 27, 1984.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

DATED: March 18, 1985.

NIELSEN, HODGSON, PARRINELLO & MUELLER
JAMES R. PARRINELLO, Esq.
JOHN E. MUELLER, Esq.
CHRISTIANE T. RIESS, Esq.
PETER J. DONNICI, Esq.

By _____
James R. Parrinello
Attorneys for Plaintiffs and Appellants

APPENDIX G

TENANTS RIGHTS AMENDMENTS ACT OF 1982[1]

BE IT ORDAINED by the People of the City of Berkeley as follows:

PART A. TITLE AND PURPOSE

This Ordinance shall be known as the Tenants Rights Amendments Act of 1982. The purposes of this Act are to further the purposes of the Rent Stabilization and Eviction for Good Cause Ordinance, as originally enacted on June 3, 1980 and to correct weaknesses found, in practice, in sections of that Ordinance. This Act is meant to amend those sections in order to help ensure that tenants' rights are protected.

PART B. AMENDMENTS

Ordinance 5261-N.S., titled Rent Stabilization and Eviction for Good Cause Ordinance, shall be amended as follows:

Section 1. TITLE.

This Ordinance shall be known as the Rent Stabilization and Eviction for Good Cause Ordinance.

Section 2. FINDINGS.

a. The Housing Element of the Berkeley Master Plan of 1977 states that:

(1) Berkeley residents have the right to decent housing in pleasant neighborhoods which meet standards of adequacy at a range of prices they can afford. (Goal 1)

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[1] The Berkeley Rent Stabilization and Good Cause for Eviction Ordinance was originally enacted on June 3, 1980. In 1982, while this case was pending in the California Court of Appeal, the Berkeley voters enacted the "Tenants' Rights Amendments Act of 1982" revising certain limited sections of the Ordinance. The revised version is reproduced in this appendix. The decision of the California Supreme Court is based on the amended Ordinance. *See* footnote 2 of the Court's opinion at page A-4, *supra*. Provisions added by the amendment are italicized; provisions deleted from the original version are reproduced but crossed out.

(2) Existing housing should be maintained and improved. (Goal 2)

(3) Berkeley should have an adequate supply of housing throughout the City for persons with special needs. (Goal 3)

(4) All residents should have equal access to housing opportunities, financing and insurance on a nondiscriminatory basis. (Goal 4)

b. On June 6, 1972, the electorate of the City of Berkeley passed a Rent Control Charter Amendment that was later voided by the California Supreme Court as being unconstitutional.

c. On June 5, 1973, the City Council declared the existence of a housing emergency in the City of Berkeley, based upon the Council's finding of a pattern of steadily rising rents, a shortage of decent housing and an increased deterioration of the existing housing stock in the City.

d. On November 7, 1978, the electorate of the City of Berkeley passed a Renter Property Tax Relief Ordinance.

e. On October 25, 1979, the Berkeley City Council, Berkeley Housing Authority, the Berkeley Housing Advisory and Appeals Board, and members of the City's administrative staff held a public workshop regarding the current housing conditions in Berkeley.

f. On October 30, 1979, January 26, 1980 and February 21, 1980, the Berkeley City Council held public hearings at which members of the public expressed their views regarding current housing conditions in Berkeley and legislative proposals for rent stabilization and eviction controls.

g. The most significant provisions of the 1978 Renter Property Tax Relief Ordinance expired on December 30, 1979.

h. On November 27, 1979, the Berkeley City Council passed an ordinance establishing a Temporary Rent Stabilization Program, effective until June 30, 1980.

Section 3. PURPOSE.

The purposes of this Ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the City with regard to low and fixed income persons, minorities, students, handicapped, and the aged.

Section 4. DEFINITIONS.

a. **BOARD:** The term "Board" refers to the appointed Rent Stabilization Board established by this Ordinance.

b. **COMMISSIONERS:** The members of the Board are denominated Commissioners.

c. **HOUSING SERVICES:** Housing services include but are not limited to repairs, maintenance, painting, providing light, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, refuse removal, furnishing, telephone, parking and any other benefit, privilege or facility connected with the use or occupancy of any rental unit. Services to a rental unit shall include a proportionate part of services provided to common facilities of the building in which the rental unit is contained.

d. **LANDLORD:** An owner of record, lessor, sublessor or any other person or entity entitled to receive rent for the use or occupancy of any rental unit, or an agent, representative or successor of any of the foregoing.

e. **RENT:** The consideration, including any deposit, bonus, benefit or gratuity demanded or received for or in connection with the use or occupancy of rental units and housing services. Such consideration shall include, but not be limited to, monies and fair market value of goods or services rendered to or for the benefit of the landlord under the rental agreement.

f. **RENTAL AGREEMENT:** An agreement, oral, written or implied, between a landlord and a tenant for use or occupancy of a rental unit and for housing services.

g. **RENTAL UNIT:** Any unit in any real property, including the land appurtenance thereto, rented or available for rent for residential use or occupancy (including units covered by the Berkeley Live/Work Ordinance No. 5217-N.S.), located in the City of Berkeley, together with all housing services connected with use or occupancy of such property such as common areas and recreational facilities held out for use by the tenant.

h. **PROPERTY:** A parcel of real property which is assessed and taxed as an undivided whole.

i. **TENANT:** Any renter, tenant, subtenant, lessee or sublessee of a rental unit, or successor to a renter's interest, or any group of tenants, subtenants, lessees, or sublessees of any rental unit, or any other person entitled to the use or occupancy of such rental unit.

j. **SKILLED NURSING FACILITY:** A health facility or a distinct part of a hospital which provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. It provides 24 hour inpatient care and, as a minimum, includes medical, nursing, dietary, pharmaceutical services and an activity program. The facility shall have effective arrangements, confirmed in writing, through which services required by the patients, but not regularly provided within the facility can be obtained promptly when needed.

k. **HEALTH FACILITY:** Any facility, place or building which is organized, maintained and operated for the diagnosis, care and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which such persons are admitted for a 24 hour stay or longer.

l. **RECOGNIZED TENANT ORGANIZATION:** Any group of tenants, residing in rental units in the same building or in different buildings operated by the same management company, agent or landlord, which requests to be so designated.

m. **RENT CEILING:** The maximum allowable rent which a landlord may charge on any rental unit covered by this Ordinance.

n. **BASE RENT CEILING:** The maximum allowable rent established under Section 10 of this Ordinance.

o. **FEES:** A fee, for the purpose of this Ordinance, is a charge fixed by law for services of public officers or for use of a privilege under control of government.

Section 5. APPLICABILITY.

This Ordinance shall apply to all real property which is being rented or is available for rent for residential use in whole or in part, except for the following:

a. Rental units which are owned by any government agency. However, the exemption of units owned by the Berkeley Housing Authority from the terms of this Ordinance shall be limited to their exemption from the terms of Section 8, Rent Registration; Section 10, Establishment of Base Rent Ceiling and Posting; Section 11, Annual General Adjustment of Rent Ceilings; and Section 12, Individual Adjustments of Rent Ceilings, of this Ordinance.

b. Rental units which are rented primarily to transient guests for ~~a period of~~ *use or occupancy* less than fourteen (14) *consecutive* days in establishments such as hotels, motels, inns, tourist homes, and rooming and boarding houses. *However, the payment of rent every fourteen (14) days or less shall not by itself exempt any unit from coverage by this Ordinance.*

c. Rental units in nonprofit cooperatives owned and controlled by a majority of the residents.

d. Rental units leased by the Berkeley Housing Authority under the Section 23 program (42 U.S.C. Section 1421b) or rental units leased to tenants assisted under the Section 8 program (42 U.S.C. Section 1437f). However, except as may

be preempted by state or federal law, the exemption of such rental units from the terms of this Ordinance shall be limited to Section 8, Rent Registration; Section 10, Establishment of Base Rent Ceiling and Posting; Section 11, Annual General Adjustment of Rent Ceilings and Section 12, Individual Adjustments of Rent Ceilings, of this Ordinance.

e. Rental units in any hospital, skilled nursing facility, health facility, asylum, or nonprofit home for the aged.

f. Rental units in a residential property which is divided into a maximum of four (4) units where one of such units is occupied by the landlord as his/her principal residence. Any exemption of rental units established under this subsection (5.f.) shall be limited to rental units that would have been exempt under the provisions of this Ordinance had this Ordinance been in effect on December 31, 1979.

After July 1, 1982, this exemption shall no longer apply to rental units in a residential property which is divided into three (3) or four (4) units. It shall continue to apply to rental units in a residential property which is divided into two (2) units, and which meet all the other requirements of this subsection (5.f.) Rental units which become non-exempt under this provision shall have the provisions of subsections 8.i. and 10.c. applied to them.

g. A rental unit in a residential property where the landlord shares kitchen or bath facilities with the tenant(s) of such rental unit and where the landlord also occupies a unit in the same property as his/her principal residence.

h. For the purposes of Subsections 5.f. and 5.g., the term landlord shall be defined only as the owner of record holding at least fifty (50) percent interest in the property.

i. New constructed rental units which are completed and offered for rent for the first time after the effective date of this Ordinance, provided that such new units were not created as a result of rehabilitation or conversion as opposed to new construction. However, the exemption of such newly constructed units shall be limited to their exemption from the terms of

Section 8, Rent Registration; Section 10, Establishment of Base Rent Ceiling and Posting; Section 11, Annual General Adjustment of Rent Ceilings; and Section 12, Individual Adjustments of Rent Ceilings, of this Ordinance.

Section 6. RENT STABILIZATION BOARD.

a. **COMPOSITION:** There shall be in the City of Berkeley a Rent Stabilization Board; the Board shall consist of nine (9) appointed Commissioners. The Board shall elect annually as chairperson one of its members to serve in that capacity.

b. **ELIGIBILITY:** Residents of the City of Berkeley are eligible to serve as Commissioners on the Board.

c. **FULL DISCLOSURE OF HOLDINGS:** All commissioners shall file with the City Clerk a verified statement listing all of their interests and dealings in real property, including but not limited to ownership, sale, management, transfer or exchange, and interests in entities whose primary purpose is the ownership, sale, management, transfer or exchange of real property during the previous three years. Such statements shall be made available for public inspection.

d. **APPOINTMENT OF COMMISSIONERS:** Commissioners shall be appointed by members of the Berkeley City Council in accordance with the Fair Representation Ordinance (No. 4780-N.S.), within thirty (30) days after the adoption of this Ordinance.

e. **TERM OF OFFICE:** Commissioners' terms of office shall be in accordance with the Fair Representation Ordinance (City of Berkeley Ordinance No. 4780-N.S.).

f. **POWERS AND DUTIES:** The Board shall have the following powers and duties:

(1) Set the rent ceilings for all rental units.

(2) Require registration of all rental units under Section 8.

(3) Publicize the manner in which the Base Rent Ceiling is established under Section 10.

(4) To make adjustments in the rent ceiling in accordance with Sections 11 and 12.

(5) Set rents at fair and equitable levels in view of and in order to achieve the purposes of this Ordinance.

(6) To issue orders, rules and regulations, conduct hearings and charge fees as set forth below.

(7) Make such studies, surveys and investigations, conduct such hearings, and obtain such information as is necessary to carry out its powers and duties.

(8) Report annually to the City Council of the City of Berkeley on the status of rental housing units covered by this Ordinance.

(9) Request the City Council to remove rent controls under Section 6.q.

(10) Administer oaths and affirmation and subpoena witnesses and relevant documents.

(11) Establish rules and regulations for settling civil claims under Section 15.

(12) Seek injunctive relief under Section 15.

(13) Pursue civil remedies in courts of appropriate jurisdiction.

(14) Intervene as an interested party in any litigation brought before a court of appropriate jurisdiction by a landlord or tenant with respect to rental units covered by this Ordinance.

(15) Hold public hearings.

(16) Other powers necessary to carry out the purposes of this Ordinance which are not inconsistent with the terms of this Ordinance.

(17) Except as provided in Section 6.n. of this Ordinance, the Board shall finance its reasonable and necessary expenses for its operation without the use of General Fund monies of the City of Berkeley.

g. **RULES AND REGULATIONS:** The Board shall issue and follow such rules and regulations, including those which are contained in this Ordinance, as will further the purposes of this Ordinance. The Board shall publicize its rules and regulations prior to promulgation in at least one newspaper of general circulation in the City of Berkeley.

All rules and regulations and relevant documents explaining the decisions, orders, and policies of the Board shall be kept in the Board's office and shall be available to the public for inspection and copying.

The Board shall publicize this Ordinance so that all residents of Berkeley will have the opportunity to become informed about their legal rights and duties under this Ordinance. The Board shall prepare a brochure which fully describes the legal rights and duties of landlords and tenants under this Ordinance. The brochure shall be made available to the public.

h. **MEETINGS:** The Board shall hold regularly scheduled meetings. Special meetings shall be called at the request of at least a majority of the Commissioners of the Board. The Board shall hold its initial meeting no later than July 15, 1980.

i. **QUORUM:** Five (5) Commissioners shall constitute a quorum for the Board.

j. **VOTING:** The affirmative vote of five (5) Commissioners of the Board is required for a decision, including all motions, rules, regulations, and orders of the Board.

k. **COMPENSATION:** The Rent Stabilization Board shall be a working Board. In order to compensate Commissioners for their time and work performed as required by this Ordinance, Commissioners shall receive five dollars per hour, but in no case shall compensation for any one Commissioner exceed three thousand dollars in the first twelve month period or in any subsequent annual period that the Board is in operation for services rendered. Procedures and regulations for accounting for hours worked and compensation shall be developed and adopted by the Board and filed with the City Clerk.

Upon request by the Board the City Council may annually adjust the hourly compensation rate and the maximum annual sum received by the Commissioners.

l. **DOCKETS:** The Board shall maintain and keep in its office all hearing dockets, which shall be available for public inspection.

m. **VACANCIES:** If a vacancy shall occur on the Board, a qualified person to fill such vacancy shall be appointed in accordance with this Ordinance and the Fair Representation Ordinance (No. 4780-N.S.).

n. **FINANCING:** The Board shall finance its reasonable and necessary expenses for its operation without the use of General Fund monies of the City of Berkeley except as stated in this subsection, by charging landlords an annual registration fee of twelve dollars ($12.00) per unit, per year in the first year of operation. After the first year, upon request by the Board the City Council may make reasonable annual adjustments in the fee. The Board is also empowered to request and receive funding when and if necessary, from any available source, except the City of Berkeley's General Fund, for its reasonable and necessary expenses, including but not limited to salaries and all other operating expenses.

Notwithstanding the preceding provision of this Section, the City Council of the City of Berkeley shall appropriate as a loan to the Rent Stabilization Board sufficient funds for the reasonable and necessary expenses of the Board during the six month period following the adoption of this Ordinance, said funds to be repaid to the City by the Rent Stabilization Board within one year's period following the adoption of this Ordinance.

o. **STAFF:** The City Manager is authorized to employ and pay staff for the Board, including hearing examiners and inspectors, as may be necessary to perform the Board's functions efficiently in order to fulfill the purposes of this Ordinance.

p. **REGISTRATION:** The Board shall require the registration of all rental units covered by this Ordinance as provided for in Section 8. The Board may also require landlords to provide current information supplementing their registration statements.

q. **DECONTROL:** If the annual average vacancy rate for all rental units in the City of Berkeley exceeds five (5) percent over a six month period, the City Council is empowered, upon request by the Board, at its discretion and in order to achieve the purposes of this Ordinance, to exempt rental units covered by this Ordinance from Sections 8, 10, 11, and 12 of this Ordinance. In determining the vacancy rate for the City of Berkeley the Board and the City Council shall consider all available data and may conduct their own survey. If units are exempted pursuant to this Subsection (6.q.) coverage shall be reimposed if the City Council finds that the average annual vacancy rate has thereafter fallen below five (5) percent. Prior to any decision to exempt or renew coverage for rental units under this Subsection (6.q.) the Board shall hold at least two public hearings.

r. **CONFLICT OF INTEREST:** Commissioners shall not necessarily be disqualified from exercising any of their powers and duties on the grounds of a conflict of interest solely on the basis of their status as a landlord or tenant. However, a Commissioner shall be disqualified from ruling on a petition for an individual adjustment of a rent ceiling under Section 12, where the Commissioner is either the landlord of the property or a tenant residing in the property that is involved in the petition.

Section 7. SECURITY DEPOSITS.

Any payment or deposit of monies by the tenant, the primary function of which is to secure the performance of a rental agreement or any part of such agreement, including an advance payment of rent, shall be placed by he landlord, in an interest bearing account at an institution whose accounts are insured by the Federal Savings and Loan Insurance Corporation until such time as it is returned to the tenant or entitled to be used by the landlord. The interest earned by said payment or deposit on monies shall be returned *to the tenant annually, either through a rent rebate or cash payment, in December of each year. The balance of any interest earned by said payment or deposit on monies shall be returned* along with the appropriate part of the principal to the tenant upon departure from the premises.

Section 8. RENT REGISTRATION.

a. The Board shall require all landlords subject to the provisions of this Ordinance to file with the Board by September 1, 1980 a rent registration statement for each rental unit covered by this Ordinance. An owner who has resided in a single family dwelling for at least 365 consecutive calendar days need not file a rent registration statement under the provisions of this Ordinance if he/she rents this single family dwelling to another person or persons for a period not to exceed nine calendar months.

b. Landlords shall provide in their initial rent registration statement the following information:

(1) The address of each rental unit;

(2) the name and address of the landlord(s) and the managing agent, if any;

(3) The date on which the landlord received legal title to or equitable interest in the rental unit;

(4) The housing services provided for the rental unit;

(5) The rent in effect on June 6, 1978;

(6) The rent in effect on December 30, 1979;

(7) The base rent ceiling;

(8) The lowest rent in effect between June 6, 1978, and the date of the adoption of this Ordinance;

(9) The amount of any deposits or other monies in addition to periodic rent demanded or received by the landlord in connection with the use or occupancy of the rental unit;

(10) Whether the rental unit was vacant or occupied on May 31, 1980;

(11) Rent in effect on December 31, 1981.

c. All rent registration statements provided by landlords in accordance with this Ordinance shall include an affidavit signed by the landlord declaring under penalty of perjury that the information provided in the rent registration statement is true and correct.

d. The first annual-registration fee of twelve dollars ($12.00) per unit shall be paid by the landlords to the Board no later than September 1, 1980. Subsequent annual registration fees set in accordance with Section 6.n. of this Ordinance shall be paid no later than September 1 of each year.

e. The Board shall provide forms for the registration information required by this Section and shall make other reasonable efforts to facilitate the fulfillment of the requirments set forth in this Section.

f. Every annual registration fee required by this Ordinance which is not paid on or before September 1 is declared delinquent, and the Board shall add to said registration fee and collect a penalty of one hundred (100) percent of the fee so delinquent in addition to the fee. *Every sixty (60) days that the fee and penalty remain delinquent, the penalty shall be increased by one hundred (100) percent of the original fee. The Board may waive the penalty if payment is made within thirty (30) days of the original due date.*

A landlord may request the Board to waive the penalty if he/she can show good cause for the delinquent payment.

g. The amount of any registration fee and penalty imposed by the provisions of this Ordinance shall be deemed a debt to the City.

h. Within thirty days after the filing of a rent registration statement, the Board shall provide a true and correct copy of said statement to the occupant of the respective unit.

i. Landlords of formerly exempt units shall register within sixty (60) days of coming under coverage of this Ordinance. The registration fee for this first-time registration shall be pro-rated based upon the number of months remaining to the next September 1 annual registration deadline.

j. No landlord shall be deemed to be in compliance with this Section with respect to a given unit until the landlord has completed registration for all covered units in the same property. Registration shall be deemed complete when all required information has been provided and all outstanding fees and penalties have been paid.

k. Registration fees shall not be passed along to the tenants without the express, prior approval of the Board. Under no circumstances shall penalties be passed along to tenants.

Section 9. USE AND CONFIDENTIALITY OF INFORMATION SUBMITTED TO BOARD.

a. All information and forms required by this Ordinance and submitted to the Board shall not be used by any other governmental unit of the City of Berkeley for the enforcement of City of Berkeley Ordinances other than this Ordinance.

b. The Board shall adopt rules and regulations providing for the confidentiality of information submitted to the Board in support of a petition for an individual rent ceiling adjustment under Section 12 of this Ordinance when such confidentiality is deemed necessary by the Board.

Section 10. ESTABLISHMENT OF BASE RENT CEILING AND POSTING.

a. **Base Rent Ceiling.** Upon adoption of this Ordinance, no landlord shall charge rent for any rental unit covered by the terms of this Ordinance affecting rents in an amount greater than the lawful rent which was actually due and payable on, or last preceding, May 31, 1980, under the periodic term of the rental agreement, in accordance with the provisions of the Temporary Rent Stabilization Ordinance, No. 5212-N.S., except as permitted by the Board under Sections 11 and 12 of this Ordinance. Such lawful rent in effect on May 31, 1980, is the base rent ceiling and is a reference point from which the rent ceiling shall be adjusted in accordance with Sections 11 and 12. For such rental units where no rent was in effect on May 31, 1980, the base rent ceiling shall be the most recent lawful periodic rent in effect for that rental unit during the six months preceding that date. For such rental units where no periodic rent was in effect on May 31, 1980, or during the six months preceding that date, the base rent ceiling shall be a good faith estimate of the median rent in effect for comparable units in the City of Berkeley on May 31, 1980.

b. **Posting.** The Board may establish reasonable rules and regulations for the posting of rent ceiling and other relevant information to further the purposes of this Ordinance.

*c. **Previously Exempt Units.** For rental units specified in Subsection 5.f., the base rent ceiling shall be the rent in effect on December 31, 1981. For such rental units where no rent was in effect on December 31, 1981, the base rent ceiling shall be the most recent lawful periodic rent in effect for that rental unit during the six months preceeding that date. For such rental units where no periodic rent was in effect on December 31, 1981, or during the six months preceeding that date, the base rent ceiling shall be a good faith estimate of the median rent in effect for comparable units, located in the same census tract, and similar in age, size, maintenance, upkeep, and services.*

Section 11. ANNUAL GENERAL ADJUSTMENT OF RENT CEILINGS.

a. Once each year, the Board shall consider setting and adjusting the rent ceiling for all rental units covered by this Ordinance in general and/or particular categories of rental units covered by this Ordinance deemed appropriate by the Board. The Board shall hold at least two public hearings prior to making any annual general adjustment of the rent ceilings. ~~The first such public hearing shall be conducted no later than October 31, 1980 and the first annual general adjustment shall be made no later than December 31, 1980.~~ *The Board shall publish and publicize notices of the date, time, and place of the public hearings at least thirty (30) days prior to the hearing date. The two required public hearings shall be conducted and the annual general adjustment shall be set between September 1 and October 31, of each year. The annual adjustment shall become effective the following January 1.*

b. In making annual general adjustments of the rent ceiling, the Board shall:

(1) Adjust the rent ceiling upward by granting those landlords who pay for utilities a utility adjustment for increases in the City of Berkeley for utilities.

(2) Adjust the rent ceiling upward by granting landlords a property tax, maintenance and operating expense increase adjustment (exclusive of utilities) for increases in the City of Berkeley for property taxes and maintenace and operating expenses.

(3) Adjust the rent ceiling downward by requiring landlords to decrease rents for any decreases in the City of Berkeley for property taxes.

(4) Adjust the rent ceiling downward by requiring landlords who pay for utilities to decrease rents for any decreases in the City of Berkeley for utilities.

In adjusting rents *ceilings* under this subsection, the Board shall adopt a formula or formulas of general application. This formula will be based upon ~~a survey of~~ *the annual rent registration forms, surveys, information and testimonies presented at public hearings, and* other available data indicating increases or decreases in the expenses *relating to the rental housing market* in the City of Berkeley set forth in this subsection. For maintenance and operating expense adjustments, the Board may also use survey data from surrounding communities where appropriate. The Board shall make no more than one annual adjustment of rent ceilings per rental units per year.

Adoption of a formula greater than forty-five percent (45%) of the increase in the Consumer Price Index for the twelve months ending the previous June 30 shall require the affirmative vote of six (6) Commissioners, other provisions notwithstanding. Adoption of such a formula shall be a specific and special exception to the requirement of only five (5) affirmative votes to make a decision. For the purposes of this subsection, the Consumer Price Index shall mean the Consumer Price Index for all urban consumers in San Franciso—Oakland, all items (1967 equals 100), as reported by the Bureau of Labor Statistics of the U.S. Department of Labor, as it pertains to the City of Berkeley.

c. An upward general adjustment in rent ceilings does not automatically provide for a rent increase. Allowable rent increases pursuant to a general upward adjustment shall become effective only after the landlord gives the tenant at least a thirty (30) days written notice of such rent increase and the notice period expires.

d. If the Board makes a downward general adjustment in the rent ceilings, landlords of rental units to which this adjustment applies shall give tenants of such rental units written notice of the rent decrease to which they are entitled. Such rent decreases shall take effect not later than thirty (30) days after the effective date set by the Board for the downward general adjustment.

e. If the maximum allowable rent specified under this Ordinance for a rental unit is greater than the rent specified for such unit in the rental agreement, the lower rent specified in the rental agreement shall be the maximum allowable rent until the rental agreement expires. If the maximum allowable rent specified under this Ordinance for a rental unit is less than the rent specified for such unit in the rental agreement, the lower rent specified under this Ordinance shall be the maximum allowable rent.

f. No rent increase pursuant to an upward general adjustment of a rent ceiling shall be effective if the landlord:

(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and/or orders or regulations issued thereunder, or

(2) Has failed to bring the rental unit into compliance with the implied warranty of habitability, *or*

(3) Has failed to make repairs as ordered by the Housing Inspection Services of the City of Berkeley, or

(4) Has failed to completely register by September 1, except as provided in Subsection 11.g. below.

g. The amount of an upward general adjustment for which a landlord shall be eligible shall decrease by ten (10) percent per month for each month beyond December 1 for which the landlord fails to register.

h. A landlord who is ineligible to raise rents under an upward general adjustment for an entire calendar year shall not be eligible to raise rents under that particular general adjustment in future years.

Section 12. INDIVIDUAL ADJUSTMENTS OF RENT CEILINGS.

a. **Petitions.** Upon receipt of a petition by a landlord and/or tenant, the rent ceiling of individual controlled rental units may be adjusted upward or downward in accordance with the procedures set forth elsewhere in this Section. The petition shall be on the form provided by the Board. The Board may set a reasonable per unit fee based upon the expenses of processing the petition to be paid by the petitioner at the time of filing. No petition shall be filed before September 1, 1980. Notwithstanding any other provision of this Section, the Board or hearing examiner may refuse to hold a hearing and/or grant an individual rent ceiling adjustment for a rental unit if an individual hearing has been held and decision made with regard to the rent ceiling for such unit within the previous six months.

b. **Hearing Procedure.** The Board shall enact rules and regulations governing hearings and appeals of individual adjustments of rent ceilings which shall include the following:

(1) **Hearing Examiner.** A hearing examiner appointed by the Board shall conduct a hearing to act upon the petition for individual adjustments of rent ceilings and shall have the power to administer oaths and affirmations.

(2) **Notice.** The Board shall notify the landlord if the petition was filed by the tenant, or the tenant, if the petition was filed by the landlord, of the receipt of such a petition and a copy thereof.

(3) **Time of Hearing.** The hearing officer shall notify all parties as to the time, date and place of the hearing.

(4) **Records.** The hearing examiner may require either party to an individual rent ceiling adjustment hearing to provide it with any books, records and papers deemed pertinent in addition to that information contained in registration statements. The hearing examiner shall conduct a current building inspection and/or request the City to conduct a current building inspection if the hearing examiner finds good cause to believe the Board's current

information does not reflect the current condition of the controlled rental unit. The tenant may request the hearing examiner to order such an inspection prior to the date of the hearing. All documents required under this Section shall be made available to the parties involved prior to the hearing at the office of the Board. In cases where information filed in a petition for an individual rent ceiling adjustment or in additional submissions filed at the request of the hearing examiner is inadequate or false, no action shall be taken on said petition until the deficiency is remedied.

(5) **Open Hearings.** All individual rent ceiling adjustment hearings shall be open to the public.

(6) **Right of Assistance.** All parties to a hearing may have assistance in presenting evidence and developing their position from attorneys, legal workers, recognized tenant organization representatives or any other persons designated by said parties.

(7) **Hearing Board.** The Board shall make available for inspection and copying by any person an official record which shall constitute the exclusive record for decision on the issues at the hearing. The record of the hearing, or any part of one, shall be obtainable for the cost of copying. The record of the hearing shall include: all exhibits, papers and documents required to be filed or accepted into evidence during the proceedings; a list of participants present; a summary of all testimony accepted in the proceedings; a statement of all materials officially noticed; all recommended decisions, orders and/or rulings; all final decisions, orders and/or rulings, and the reasons for each final decision, order and/or ruling. Any party may have the proceeding tape recorded or otherwise transcribed at his or her own expense.

(8) **Quantum of Proof and Notice of Decision.** No individual rent ceiling adjustment shall be granted unless supported by the preponderance of the evidence submitted at the hearing. All parties to a hearing shall be sent a notice of the decision and a copy of the findings of fact and

law upon which said decision is based. At the same time, parties to the proceedings shall also be notified of their right to and the time limit for any appeal allowed by the Board and/or to judicial review of the decision pursuant to this Section and Section 18 of this Ordinance.

(9) **Consolidation.** All landlord petitions pertaining to tenants in the same building shall be consolidated for hearing, and all petitions filed by tenants occupying the same building shall be consolidated for hearing unless there is a showing of good cause not to consolidate such petitions.

(10) **Appeal.** Any person aggrieved by the decision of the hearing examiner may appeal to the Board or to any appeals panel of the Board established by the Board, so long as such panel has at least three (3) Commissioners. On appeal the Board or panel shall affirm, reverse, remand, or modify the decision of the hearing examiner. The Board or panel may conduct a new (de novo) hearing or may act on the basis of the record before the hearing examiner without holding a hearing. An appeal to the Board shall be filed no later than thirty (30) days after receipt of the notice of the decision of the hearing examiner. The Board may set a reasonable appeal fee to be paid by the appellant at the time of filing the appeal.

(11) **Finality of Decision.** The decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal; however, in the event that the Board or panel reverses or modifies the decision of the hearing examiner, the Board shall order the appropriate party to make retroactive payments to restore the parties to the position they would have occupied had the hearing examiner's decision been the same as that of the Board's.

(12) **Time for Decision.** The rules and regulations adopted by the Board shall provide for final Board action on any individual rent adjustment petition within one hundred and twenty (120) days following the date of

filing of the individual rent ceiling adjustment petition, unless the conduct of the petitioner or other good cause is responsible for the delay.

(13) **Board Action in Lieu of Reference to Hearing Examiner.** The Board, on its own motion or on the request of any landlord or tenant, may hold a hearing on an individual petition for a rent ceiling adjustment without the petition first being heard by a hearing examiner.

c. In making individual adjustments of the rent ceiling, the Board or the hearing examiner shall consider the purposes of this Ordinance and shall specifically consider all relevant factors, including (but not limited to):

(1) Increases or decreases in property taxes;

(2) Unavoidable increases or any decreases in maintenance and operating expenses;

(3) The cost of planned or completed capital improvements to the rental unit (as distinguished from ordinary repair, replacement and maintenance) where such capital improvements are necessary to bring the property into compliance or maintain compliance with applicable local code requirements affecting health and safety, and where such capital improvement costs are properly amortized over the life of the improvement;

(4) Increases or decreases in the number of tenants occupying the rental unit, living space, furniture, furnishings, equipment, or other housing services provided, or occupancy rules;

(5) Substantial deterioration of the controlled rental unit other than as a result of normal wear and tear;

(6) Failure on the part of the landlord to provide adequate housing services, or to comply substantially with applicable state rental housing laws, local housing, health and safety codes, or the rental agreement;

(7) The pattern of recent rent increases or decreases;

(8) The landlord's rate of return on investment. In determining such return, all relevant factors, including but not limited to the following shall considered: the landlord's actual cash down payment, method of financing the property, and any federal or state tax benefits accruing to landlord as a result of ownership of the property;

(9) Whether or not the property was acquired or is held as a long-term or short-term investment; and

(10) Whether or not the landlord has received rent in violation of the terms of this Ordinance or has otherwise failed to comply with the Ordinance.

It is the intent of this Ordinance that individual upward adjustments in the rent ceilings on units be made only when the landlord demonstrates that such adjustments are necessary to provide the landlord with a fair return on investment.

d. No individual upward adjustment of a rent ceiling shall be authorized by the Board by reason of increased interest or other expenses resulting from the landlord's refinancing the rental unit if, at the time the landlord refinanced, the landlord could reasonably have foreseen that such increased expenses could not be covered by the rent schedule then in existence, except where such refinancing is necessary for the landlord to make capital improvements which meet the criteria set forth in Section 12.c.(3). This paragraph shall only apply to that portion of the increased expenses resulting from the refinancing that were reasonably foreseeable at the time of the refinancing of the rental unit and shall only apply to rental units refinanced after the date of adoption of this Ordinance.

e. Except for cases of individual hardship as set forth in Subsection 12.i. of this Ordinance, no individual upward adjustment of a rent ceiling shall be authorized by the Board because of the landlord's increased interest or other expenses resulting from the sale of the property, if at the time the landlord acquired the property, the landlord could have reasonably foreseen that such increased expenses would not be covered by the rent schedule then in effect. This Subsection (12.e.) shall only apply to rental units acquired after the date of adoption of this Ordinance.

f. No upward adjustment of an individual rent ceiling shall be authorized by the Board under this Section if the landlord:

(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and/or orders or regulations issued thereunder by the Board, or

(2) Has failed to bring the rental unit into compliance with the implied warranty of habitability.

g. Allowable rent increases pursuant to an individual upward adjustment of the rent ceiling shall become effective only after the landlord gives the tenant at least a thirty (30) day written notice of such rent increase and the notice period expires.

h. If the Board makes a downward individual adjustment of the rent ceiling, such rent decrease shall take effect no later than thirty (30) days after the effective date set by the Board for the downward adjustment.

i. No provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment.

Section 13. GOOD CAUSE REQUIRED FOR EVICTION.

a. No landlord shall be entitled to recover possession of a rental unit covered by the terms of this Ordinance unless said landlord shows the existence of one of the following grounds:

(1) The tenant has failed to pay rent to which the landlord is legally entitled pursuant to the lease or rental agreement and under the provisions of state or local law, unless the tenant has withheld rent pursuant to applicable law; *and said failure has continued after service on the tenant of a written notice setting forth the amount of rent then due and requiring it to be paid, within a period, specified in the notice, of not less than three days.*

(2) The tenant has continued, after written notice to cease, to substantially violate any of the material terms of the rental agreement, except the obligation to surrender possession on proper notice as required by law, and provided that such terms are reasonable and legal and have been accepted in writing by the tenant or made part of the rental agreement; *and provided further that, where such terms have been accepted by the tenant or made part of the rental agreement subsequent to the initial creation of the tenancy, the landlord shall have first notified the tenant in writing that he or she need not accept such terms or agree to their being made part of the rental agreement.*

(3) The tenant has willfully caused or allowed substantial damage to the premises beyond normal wear and tear and has refused, after written notice, to pay the reasonable costs of repairing such damage and cease damaging said premises.

(4) The tenant has refused to agree to a new rental agreement upon expiration of a prior rental agreement, but only where the new rental agreement contains provisions that are substantially identical to the prior rental agreement, and is not inconsistent with local, state and federal laws.

(5) The tenant has continued, following written notice to cease, to be so disorderly as to destroy the peace and quiet of other tenants or occupants of the premises.

(6) The tenant has, after written notice to cease, refused the landlord access to the unit as required by state or local law.

(7) *(A)* The landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to undertake substantial repairs which are necessary to bring the property into compliance with applicable codes and laws affecting the health and safety of tenants of the building or where necessary under an outstanding notice of code violations affecting the health and safety of tenants of the building, and where such repairs cannot be completed while the tenant resides on the premises.

(B) Where such repairs can be completed in a period of sixty or fewer days, and the tenant, within thirty days after the service of a notice of termination of his or her tenancy, agrees in writing to vacate the premises during the period required to complete the repairs at no charge to the landlord, other than abatement of the obligation to pay rent for the premises during the period required to complete the repairs, the landlord may not recover possession pursuant to this Subsection 13.a.(7) unless the tenant shall fail or refuse to vacate the premises in accordance with such agreement.

(C) Where the landlord owns any other residential rental units in the City of Berkeley, and any such unit is vacant and available at the time of service of the written notice terminating the tenancy, or at any time thereafter until the earlier of the tenant's vacating the premises or the entry of a judgment by a court of competent jurisdiction awarding possession of the premises to the landlord, the landlord shall, as a condition of obtaining possession pursuant to this Subsection 13.a.(7), notify tenant in writing of the existence and address of each such vacant rental unit and offer tenant the right, at the tenant's option:

(1) to enter into a rental agreement (to be designated as a "temporary rental agreement") on any available rental unit which the tenant may choose, at a rent not to exceed the lesser of the lawful rent which may be charged for such available rental unit or the lawful rent in effect, at the time of the notice of termination of tenancy, on the unit being vacated, said rental agreement to be for a term of the lesser of ninety days or until completion of repairs on the rental unit being vacated by tenant, or;

(2) to enter into a new rental agreement or lease for such available rental unit at a rent not to exceed the lawful rent which may be charged for such available rental unit.

(D) Where the landlord recovers possession under this subsection 13.a.(7), the tenant must be given the right of first refusal to re-occupy the unit upon completion of the

required work. *In the event landlord files an application for an individual rent adjustment within six months following the completion of the work, the tenant shall be a party to such proceeding the same as if he or she were still in possession, unless the landlord shall submit, with such application, a written waiver by the tenant of his or her right to re-occupy the premises pursuant to this subsection.*

(8) The landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to recover possession of the rental unit, in order to remove the rental unit from the market by demolition.

(9) The landlord seeks in good faith to recover possession for his or her own use or and occupancy as his or her principal residence, or for the use and occupancy as a principal residence by the landlord's spouse or by the landlord's ~~or the landlord's spouse's~~ child, *or* parent, ~~brother, sister, grandparents or grandchildren.~~ For the purposes of this subsection 13.a.(9), the term landlord shall be defined as the owner of record, *as of the time of giving of a notice terminating the tenant's tenancy, and at all times thereafter to and including the earlier of the tenant's surrender of possession of the premises or the entry of a judgment of a court of competent jurisdiction awarding possession of the premises to the landlord,* holding at least a 50% interest in the property and shall not include a lessor, sublessor, or agent of the owner of record. The landlord may not recover possession under this subsection 13.a.(9) if a comparable unit ~~is~~ *was, at the time of the landlord's decision to seek to recover possession of the rental unit,* already vacant and available in the property, *or if a comparable unit thereafter becomes vacant in the property at any time until the earlier of the tenant's surrender of possession of the premises or the entry of a judgment of a court of competent jurisdiction awarding possession of the premises to the landlord. In an action by or against the tenant, evidence that a comparable unit was vacant and available in the property within ninety days prior to the date of a notice terminating the tenant's tenancy shall create a presumption that such unit was vacant and available at the*

time of the landlord's decision to seek to recover possession of the premises. "Presumption" means that the Court must find the existence of the presumed fact unless and until the contrary is proven by a preponderance of the evidence.

(10) A landlord or lessor seeks in good faith to recover possession of the rental unit for his/her occupancy as a principal residence, where the landlord or lessor has previously occupied the rental unit as his/her principal residence and has the right to recover possession of the unit for his/her occupancy as a principal residence under an existing rental agreement with the current tenants.

(11) The tenant fails to vacate a rental unit occupied under the terms of a temporary rental agreement entered into pursuant to the provisions of subsection 13.a.(7)(C), following expiration of the term of said temporary rental agreement, and following written notice of the availability of tenant's previous rental unit for re-occupancy by tenant (if the term of the rental agreement has expired by reason of the completion of repairs on the old rental unit), or of written notice to quit (if the term of the rental agreement has expired by reason of the expiration of a period of ninety days).

b. A landlord's failure to specify good cause as listed above in subsections 1 through ~~10~~ *11* of Section 13.a. in the notice of termination or the notice to quit and in the complaint for possession shall be a defense to any action for possession of a rental unit covered by the terms of this Ordinance.

c. In any action to recover possession of a rental unit covered by the terms of this Ordinance, except an action to recover possession under subsections 13.a.(7), ~~and~~ 13.a.(8) *or 13.a.(11),* a landlord shall allege, *as to each rental unit on the property,* substantial compliance *as of the date of the notice of termination or notice to quit and as of the date of the commencement of the action for possession* with the implied warranty of habitability and compliance *as of the date of the notice of termination or notice to quit and as of the date of the commencement of the action for possession* with Sections 10 (Rent Ceiling) and 8 (Rent Registration) of this Ordinance.

d. The landlord shall file with the Board a copy of any notice of termination, notice to quit, and/or summons and complaint, within ten (10) days after the tenant has been served with such notice or summons and complaint.

Section 14. RETALIATION PROHIBITED.

No landlord may threaten to bring, or bring, an action to recover possession, cause the tenant to quit the unit involuntarily, *serve any notice to quit or notice of termination of tenancy,* decrease any services or increase the rent where the landlord's intent is retaliation against the tenant for the tenant's assertion or exercise of rights under this Ordinance. Such retaliation shall be a defense to an action to recover possession, or it may serve as the basis for an affirmative action by the tenant for actual and punitive damages and injunctive relief. In an action by or against a tenant, evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory. "Presumption" means that the Court must find the existence of the fact presumed unless and until ~~evidence is introduced which would support a finding of its nonexistence~~ *its nonexistence is proven by a preponderance of the evidence.* A tenant may assert retaliation affirmatively or as a defense to the landlord's action without the aid of the presumption *regardless of the period of time which has elapsed between the tenant's assertion or exercise of rights under this Ordinance and the alleged act of retaliation.*

Section 15. REMEDIES.

a. **For Violation of Rent Ceilings or Failure to Register.** If a landlord fails to register in accordance with Section 8 of this Ordinance, or if a landlord demands, accepts, receives or retains any payment in excess of the maximum allowable rent permitted by this Ordinance, a tenant may take any or all of the following actions until compliance is achieved:

(1) A tenant may petition the Board for appropriate relief. If the Board, after the landlord has proper notice and after a hearing, determines that a landlord has willfully and knowingly failed to register a rental unit covered

by this Ordinance or violated the provisions of Sections 10, 11 and 12 of this Ordinance, the Board may authorize the tenant of such rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is brought into compliance with this Ordinance. After a rental unit is brought into compliance, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not in compliance. Whether or not the Board allows such withholding, no landlord who has failed to comply with the Ordinance shall at any time increase rents for a rental unit until such unit is brought into compliance.

(2) A tenant may withhold up to the full amount of his or her periodic rent which is charged or demanded by the landlord under the provisions of this Ordinance. In any action to recover possession based on nonpayment of rent, possession shall not be granted where the tenant has withheld rent in good faith under this Section.

(3) A tenant may seek injunctive relief on behalf of herself or himself to restrain the landlord from demanding or receiving any rent on the unit until the landlord has complied with the terms of this Ordinance.

(4) A tenant may file a damage suit against the landlord for actual damages when the landlord receives or retains any rent in excess of the maximum rent allowed under this Ordinance. Upon further proof of a bad faith claim by the landlord or the landlord's retention of rent in excess of the maximum rent allowed by this Ordinance, the tenant shall receive a judgment of up to seven hundred and fifty dollars ($750.00) in addition to any actual damages.

b. **For Violation of Eviction Proceedings.** If it is shown in the appropriate court that the event which the landlord claims as grounds to recover possession under Subsection 13.1(7), Subsection 13.a(8), Subsection 13.a.(9), or Subsection 13.a.(10) is not initiated within two months after the tenant vacates the unit, or it is shown the landlord's claim was false or in bad faith, the tenant shall be entitled to regain possession

and to actual damages. If the landlord's conduct was willful, the tenant shall be entitled to damages in an amount of $750 or three times the actual damages sustained, whichever is greater.

c. The City Attorney may bring an action for injunctive relief on behalf of the City or on behalf of tenants seeking compliance by landlords with this Ordinance.

d. The Board may seek injunctive relief to restrain or enjoin any violation of this Ordinance or of the rules, regulations, orders and decisions of the Board.

e. If a tenant fails to bring a civil or administrative action within one hundred and twenty (120) days from the date of the first occurrence of a violation of this Ordinance, the Board may either settle the claim arising from the violation or bring such action. Thereafter, the tenant on whose behalf the Board acted may not bring an action against the landlord in regard to the same violation for which the Board has made a settlement or brought an action. In the event the Board settles the claim it shall be entitled to retain from any payments made by the landlord, the costs it incurred in settlement, and the tenant aggrieved by the violation shall be entitled to the remainder.

Section 16. PARTIAL INVALIDITY.

If any provision of this Ordinance or application thereof is held to be invalid, this invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provisions or applications, and to this end the provisions and applications of this Ordinance are severable.

Section 17. NONWAIVERABILITY.

Any provision in a rental agreement which waives or modifies any provision of this Ordinance is contrary to public policy and void.

Section 18. JUDICIAL REVIEW.

A landlord or tenant aggrieved by any action or decision of the Board may seek judicial review in a court of appropriate jurisdiction.

Section 19. CRIMINAL PENALTIES.

Any landlord who is found by a court of competent jurisdiction to be guilty of a willful violation of this Ordinance shall be subject to up to a five hundred dollar ($500) fine and/or ninety (90) days in jail for a first offense and up to a three thousand dollar ($3,000) fine and/or one year in jail for any subsequent offenses.

PART C. EFFECT OF PARTIAL INVALIDITY.

If any provision of this Act or application thereof is held to be invalid, this invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provisions or applications, and to this end the provisions and applications of this Act are severable. This Act is intended to amend the provisions of the Rent Stabilization and Eviction for Good Cause Ordinance, and, in the event any provision of this Act or application thereof is held to be invalid, then the provisions of that Ordinance as in effect prior to their Amendment by this Act shall be deemed to apply.

APPENDIX H

BAY AREA COUNCIL

RENTAL HOUSING IN CALIFORNIA: OBSTACLES & OPPORTUNITIES

April, 1983

This discussion paper presents findings of a Bay Area Council study of the California and Bay Area climate for investment in rental housing. The Council is a business-sponsored public affairs organization active in local, regional, and state housing issues. The study is part of the Council's two-year Housing Action Program, which is aimed at encouraging production of more housing in the Bay Area. The program includes the participation of government, the housing industry, lenders, the academic community, consultants, nonprofit organizations, and citizen groups, as well as business.

Why Business is Concerned

The business community has a direct interest in the availability of adequate rental housing in the area. Many business firms in the region report that their employees and operations are affected by a shortage of housing accessible to employment centers. Especially in light of the high cost of home ownership in the area, the problem is most acute for employees in the lower and middle salary ranges. In response, the Bay Area Council is working to advocate public policies that would encourage multi-family housing production, and identify sources of financing.

The Context

There is presently a severe shortage of rental housing in the Bay Area, due to a sharp decline in rental production over the past few years. Builders identify several reasons for the lack of rental development, but the most critical is that rental development projects have not been economically feasible.

During the recent period of high interest rates, developers have suffered from what is often termed a "front-end" financing problem—that is, market rent levels have been too low to cover the costs of permanent development financing, particularly in the first year or two after project completion. Few developers have the ability to absorb continuing losses in hopes of some future payoff.

This pervasive and overriding problem has obscured the effects of other potential obstacles to rental housing, most notably rent control. With the seeming return of some stability to interest rates, the Bay Area Council believes the time is right for a reassessment of the climate for production of new rental housing in California and the Bay Area.

Conducted to determine what opportunities the California rental market currently holds for investors, the Council study has two components:

- an assessment of the state and regional (nine-county Bay Area) rental housing markets, including supply, anticipated demand, and potential risks and yields to investors. The study was conducted with the guidance of an advisory group consisting of economists and experts in the field of institutional investment.

- a nationwide survey of senior executives in major lending institutions, covering both those categories that have been involved in real estate lending in recent years (savings and loan associations, banks) and new sources (such as insurance companies and pension funds). The respondents to the survey constitute a sample of 79 lending institutions, estimated to represent several hundred billion dollars in assets.[1] One portion of the questionnaire was answered only by those lenders who reported some multi-family loan activity in the California market in the previous five years; survey results based on this smaller sample of 44 lenders are indicated with an asterisk.

[1] By category, the 79 survey respondents broke down as follows: 27 savings and loan associations (34%), 19 banks (24%), 16 insurance companies (21%), and 17 other alternative sources (22%).

Summary of Findings

Based on its findings, the Council has concluded that the California rental housing market has great potential to attract investment in the Eighties, but local- and state-government action will be needed to fulfill that potential.

- The outlook for investment in the Bay Area's rental housing market is promising, especially from a long-term perspective. The demand for new units is strong and getting stronger, the renter population is becoming more affluent, and in a reversal of recent trends, rents are beginning to keep pace with inflation.

- Lenders express a generally positive view of the California real estate market, and the potential for improvement in the economics of rental housing.

- If rental production is to increase substantially, California must attract not only those investors who have maintained some involvement in residential investment, but also new sources such as insurance companies and pension funds.

- Lenders perceive rent control as being by far the greatest disincentive to investment in the California rental market, and a large majority believe all communities in the state are affected, including those without rent control ordinances.

- Individual communities can take action to encourage investment in new rental units, but state-level action is also necessary.

The California Market:

A Promising Outlook

It appears that with lower interest rates, the economics of rental housing are generally becoming more favorable, particularly in a long-term context.

Demand on the Upswing

The demand for rental housing is very strong, as indicated by the region's declining vacancy rates. According to surveys by the Federal Home Loan Bank, multi-family vacancy rates dropped in almost all parts of the Bay Area over the past year, with most reporting vacancies close to 2%. (Generally, a vacancy rate of 4% to 5% is considered indicative of balanced supply and demand.)

Demand for rental units is expected to increase substantially in the years to come, because of a variety of factors including:

- the large number of Bay Area residents reaching the age of household formation (some 840,000 over the course of the decade, according to the Association of Bay Area Governments).

- a continuing trend toward smaller-sized households (an average of 2.7 persons per household in 1980, vs. forcasts of 2.36 to 2.39 in 1990).

- the high cost of home ownership in the region, which forces many households that would otherwise purchase a home to remain in the rental market.

- elderly homeowners choosing to sell their homes and rent apartments will add to the demand for rental units—a trend that may increase, since an increasing proportion of the population is aged 65 and over.

- expectations that between 314,800 and 496,500 jobs will be created in the Bay Area during the Eighties (according to ABAG and the Center for the Continuing Study of the California Economy).

At the same time, the supply of rental housing has been constrained. Rental housing production is at or near a postwar low. Since 1980, an average of fewer than 4,000 apartment permits have been issued each year in the nine-county region, a market decline from the 1976-80 average of 10,000 units annually.

Rents are Rising

After a decade of decline, real rent levels are rising, and it appears the market can still absorb a moderate increase in rents. This is critical to making rental projects economically attractive.

Bay Area rent levels have been somewhat low, according to market indicators. Rents have not been keeping pace with inflation. In fact, in inflation-adjusted terms, Bay Area rents actually declined between 1970 and 1980. This decline has reversed in the last two years, an important signal to investors. As of August, 1982, median monthly rent in the region was approximately $340.

There are several reasons why there may be room for moderate rent increases in some or all submarkets of the region:

- The Bay Area renter population has become more affluent, partly because high home prices force many who would otherwise buy to remain in the rental market. As of 1982, about 38% of households in the S.F./Oakland SMSA had annual earnings of $25,000 or more.

- Bay Bay Area renters expend a smaller portion of their incomes for rent than those nationwide (20.4% vs. 27% of monthly income, according to a 1980 housing survey by the U.S. Department of Commerce). It would require an immediate 22% increase in median rents to bring Bay Area renters up to the national median, in terms of share of income spent.

To sum up: if the "front-end" problem is eased through a stabilization of interest rates and moderate increases in rent levels, multi-family housing would seem to be a reasonably good long-term investment prospect, given the fundamental strength of the market.

It is important to note that while the Council's analysis was conducted on a regional basis, conditions can vary considerably among submarket areas, including demand, job creation trends, political climate, and potential for increased market rents. In other words, some areas may offer an investment climate that is considerably better than that for the region as a whole.

Competitive Returns

Many studies have compared the performance of real estate investments with stocks and bonds, and most lenders believe that real estate has an important place in long-term investment strategies. But only a handful of recent analyses have evaluated performance of real estate investments by property type. Of these, the three most significant found pre-tax apartment yields to be competitive with those for most other property categories in the 1970s.[2]

How Lenders View the Market

The real estate lenders surveyed support a generally positive economic outlook for the California rental housing market:

- 73% agree that "if market rents start to rise faster than inflation, lenders will be interested in lending on multi-family projects," and 72% agree with the prediction that "economic conditions will be favorable to multi-family rental projects in the near future."

- In response to an open-ended question on the most significant incentives, if any, for investment in the California market, the high level of demand for rental housing is the number-one factor named, by a wide margin. It is named first by 35% of those sampled.*

- 86% disagree with the statement, "No lender is interested in apartment development in California," and of those, almost two-thirds say they "strongly" disagree.

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[2] Sources: (1) John McMahan Associates, Inc., *Analysis of the American Council of Life Insurance Data Files in Real Estate Loans*, January, 1980; (2) Webb, James R., and Sirmans, C. F., "Yields and Risk Measures for Real Estate, 1966-77," *The Journal of Portfolio Management*, Fall, 1980; (3) Miles, Michael, and McCue, Thomas, "Historic Returns and Institutional Real Estate Portfolios," *AREUEA Journal*, Summer, 1982.

* Survey results based on that portion of the lenders sample reporting some multi-family loan activity the past five years (44 lenders).

In addition, the majority of those sampled do *not* indicate a generally negative disposition toward rental housing; 62% disagree with the statement, "Compared to other types of real estate, multi-family projects are an inherently inferior investment," with more than half of those disagreeing "strongly."

The Opportunity:

A New Influx of Funds

Since the last period of significant investment in California's rental housing market, conditions have changed substantially:

- The economics of investment in rental projects are somewhat different than before, with high interest rates and the "front-end" problem necessitating new approaches to financing.

- Federal deregulation of the financial services industry has expanded the investment choices available to savings & loan associations, which in the past have provided an estimated 60% of all residential financing in the nation. More recent federal action has given S&Ls substantial new sources of funds, but the extent to which they will invest in multi-family housing is uncertain.

- The political climate has also become more volatile; rent control and local land use policies have had a growing impact on the rental housing development process.

The need to attract financing to new rental housing is clear, based on declining production in recent years, and forecasts for growing demand in the near future. Now that the economy appears to be moving in a direction more favorable to real estate investment, there is also an opportunity to attract lenders to the California market.

Given the need for a dramatic increase in rental housing production, both recently active and new sources of residential financing must be tapped to revitalize the state's rental market.

While S&Ls and banks can no longer be relied upon to provide the major share of residential financing, they are familiar with real estate investment, and would be likely to seek and thoroughly evaluate re-emerging opportunities in the residential market.

At the same time, though large institutional investors such as insurance companies and private pension funds have not been active in residential financing in the recent past, they do have the characteristics needed to capitalize on the changing rental market. That is, they view immediate returns of individual investments as less important than overall, long-term performance and stability of their portfolios.

This means that these investors may be the best equipped to channel funds to a rental market that is still in flux, based on a promising economic outlook. It also makes them good candidates for innovative financing approaches, which generally involve deferral of investment returns to offset front-end operating income requirements. Finally, some institutional investors seek real estate investments to diversify their portfolios, as a hedge against unforeseen economic scenarios. Improving market conditions will enable them to justify investment in rental housing, as measured against alternative commercial and industrial property investments.

The Obstacles:

A Look at Rent Control

The Council's survey of lenders confirms what anecdotal evidence suggests: when the economics of rental housing are set aside, the presence of rent control in California is the most negative factor lenders see in the market:

- In response to the open-ended question, "What do you view as the greatest disincentive(s) for multi-family lending in California," more than 65%* of lenders named rent control, with 55%* naming it the number-one disincentive.

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* Survey results based on that portion of the lenders sample reporting some multi-family loan activity the past five years (44 lenders).

• In a subsequent question asking respondents to rank factors that may limit their interest in the California rental market, "the potential for enactment of rent control" was again ranked first, by a wide margin. Other factors, in rank order, were: tenant/landlord regulations, the costs of property management and maintenance, and local condo conversion regulations.*

Another question addressed in the survey is whether the presence of rent control in only a few California cities negatively affects the investment climate of the state as a whole. The survey results suggest that it does. Of the lenders surveyed, 82% agree that "Rent control is a threat to any new multi-family project in California, no matter where it is located," with 56% of the sample expressing "strong" agreement.

But despite the concern they express with the potential spread of rent control, lenders also indicate that this fear does not preclude all interest in the California rental market. Those who reported some multi-family loan activity in the state over the past five years were asked whether they would consider loaning on a project in a community with some form of rent control; while half said they were unlikely to consider such a move, 36% said they would consider such a loan application.*

The Call to Action

Obviously, the constraining effect of rent control on the production of new rental units is not an easy issue to address. A case can certainly be made for protection of existing tenants from excessive rent increases. But the dampening effect of rent control on the market suggests that such regulation offers only short-term protection for the renter population. In the long run, the production of an adequate supply of rental housing is the most effective deterrent to higher-than-market rents.

Based on the results of its lender survey, the Council has concluded that action to ease rent control's effect on the investment climate must be taken at both the local and state levels.

* Survey results based on that portion of the lenders sample reporting some multi-family loan activity the past five years (44 lenders).

Local governments can take steps to attract and encourage investment by those lenders who will consider investment in communities with rent control (36%* of those surveyed by the Council), or who are inclined to evaluate specific projects and communities on a case-by-case basis, rather than making statewide or areawide market assessments. Some 80% of lenders indicate that the existence of local rent control exemptions for a specific project would increase their interest in lending on that project.

But many lenders, particularly large institutional investors, are unlikely to conduct localized market assessments in pursuit of individual projects, and will rely on more sweeping views of the market—particularly when it comes to rent control. This is evidenced by the fact that 82% of lenders surveyed see rent control as a "threat to any new multi-family project in California," no matter what its location.

State-level action would also provide lenders with a considerably greater degree of security and encouragement than localized approaches to rent control, survey results indicate.

• Nearly 90%* indicate that State-level statutory changes to pre-empt local rent controls would increase their interest in making multi-family loans in California.

• Of those lenders who have had some multi-family loan activity in the California market, only 29% agree that "contractual exemption from rent control is enough to make a multi-family project attractive to lenders," while 39% disagree.

• Large institutional investors are even less inclined to be satisfied with local contractual exemptions, as evidenced by the fact that only 13% of insurance companies surveyed believe such exemption would be enough to make a project attractive.

• 53% agree that "multi-family lending won't become attractive until there is state-wide pre-emption of *all* local rent controls," while 27% disagree.

* Survey results based on that portion of the lenders sample reporting some multi-family loan activity the past five years (44 lenders).

Based on these findings, the Council recommends the following approaches to local and state-level action:

Local Government

In recent years, some communities and builders have taken the initiative to propose project-specific exemptions from existing or future rent control ordinances for specific projects. The use of development agreements, as authorized by a California State law (AB 853) enacted in 1979, comes closer than any other vehicle to providing a contractual exemption from future controls that cannot be rescinded by future governmental decisions.

Local governments can facilitate investment in rental projects, particularly small and medium-sized developments, by offering and encouraging such exemptions. Use of this approach has been increasing, and while some developers are reluctant to rely on a guarantee that has not been tested in the courts, many are confident that such agreements could withstand legal challenge.

Another technique being used at the local level is development of apartments with underlying condominium maps, accompanied by a development agreement requiring that the units remain in rental for a set period of time. This approach provides developers with the flexibility needed to assure a reasonable level of return with minimum risk; the primary disadvantage is the likelihood of somewhat higher development costs due to stricter condo building requirements.

State Government

Precedent exists for state-level action to preempt or limit local authority to enact rent controls. The California Housing Finance Agency is the instrument through which the State provides financing and pre-development loans for new housing development (primarily low- and moderate-income units). CHFA's founding statute and subsequent State legislative action have exempted rental housing financed by CHFA from state- or locally-imposed rent controls, in order to provide the Agency with secure market-rate yields from the projects it underwrites.

Private investors are no less in need of such certitude, if they are to provide housing producers with funds to substantially increase the supply of rental housing in the state and the Bay Area.

State-level action on rent control could take a variety of forms, each of which would raise a distinct set of issues. But fundamentally, such action would require some limitation on local authority to enact or enforce rent control, whether in the form of guidelines or some degree of pre-emption.

Without recommending among specific approaches, the Bay Area Council urges the California Legislature and the new State Administration to address, in every way possible, the issue of rent control and the need to spur private investment in housing for the renters of California.

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No. 84-1538 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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SUBJECT INDEX

	Page
TABLE OF CASES	ii
THE ORDINANCE INVOLVED	1
THE PROCEEDINGS BELOW	2
ARGUMENT	4
I. APPELLANTS' SHERMAN ACT ARGUMENT DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION	4
A. The California Supreme Court Fairly Resolved the Sherman Act Issue	4
B. Because the Record in This Case is So Sparse, This Case is Not a Suitable Vehicle for Resolution of Important Antitrust Issues by This Court	5
C. This is the First Case Wherein a Lower Court Has Decided What Antitrust Standard Should Apply to Municipal Regulations for the General Protection of the Public. This Issue Has Had No Opportunity to "Percolate" through the Lower Courts	7
D. Even If the California Supreme Court's Reasons for Affirming the Trial Court Were Incorrect, Its Ruling Was Correct on Other Grounds	9
1. No Conspiracy Was Present In the Enactment or Enforcement of the Berkeley Ordinance	9
2. Appellants Have Failed to Allege or Prove that the Berkeley Ordinance Imposes a Significant Effect on Interstate Commerce	11
3. California Statutes Contemplate that California Cities May Enact Rent Control Ordinances. Therefore, Berkeley's Enactment of the Ordinance is Exempt from Coverage of the Sherman Antitrust Act	13
E. Summary Affirmance or Dismissal Here Will Have Little or No Precedential Effect on Lower Courts	18
II. APPELLANTS' CLAIM THAT THE BERKELEY ORDINANCE IS CONFISCATORY DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION	18
CONCLUSION	21
APPENDICES	
APPENDIX 1: COMPLAINT	A-1
APPENDIX 2: RELEVANT STATUTES INVOLVED	A-2-1

TABLE OF AUTHORITIES

CASES	PAGE(S)
American Tobacco Co. v. *United States,* (1945) 328 U.S. 781	9
Birkenfeld v. *City of Berkeley,* (1976) 17 Cal.3d 129	16, 17
City of Lafayette v. *Louisiana Power & Light Co.,* (1978) 435 U.S. 389	3, 5, 13, 14
Community Communications Co. v. *City of Boulder,* (1982) 455 U.S. 40	3, 4, 5, 14
Copperweld Corp. v. *Independence Tube Corp.,* (1984) ____ U.S. ____, 104 S.Ct. 2731	10
Duke & Company, Inc. v. *Foerster,* (1975) 521 F.2d 1277 (3rd Cir.)	14
E. I. du Pont de Nemours & Co. v. *Train,* (1977) 430 U.S. 112	8
Eastern R.R. Conference v. *Noerr Motor Freight,* (1961) 365 U.S. 127	10
Euclid v. *Ambler Realty Co.,* (1926) 272 U.S. 365	20
Fisher v. *City of Berkeley,* (1984) 37 Cal.3d 644	3, 7
Fusari v. *Steinberg,* (1975) 419 U.S. 379	12
H & B Equipment Co. v. *International Harvester Co.,* (1978) 577 U.S. 239 (5th Cir.)	10
Hadacheck v. *Sebastian,* (1915) 239 U.S. 394	20
Helmsley v. *Borough of Fort Lee,* (1978) 78 N.J. 200, 394 A.2d 65	19, 20
McClain v. *Real Estate Board of New Orleans,* (1980) 444 U.S. 232	11
Monsanto Co. v. *Spray-Rite Service Corp.,* (1984) ____ U.S. ____, 104 S.Ct 1464	9, 11
Niles v. *Boston Rent Control Administrator,* (1978) 374 N.E.2d 296 (Mass.App.)	19
Page v. *Work,* (1961) 290 F.2d 323 (9th Cir.)	12
Parker v. *Brown,* (1942) 317 U.S. 341	4
Penn. Central Transp. Co. v. *New York City,* (1978) 438 U.S. 104	19, 20
Power Comm'n v. *Hope Gas Co.,* (1944) 320 U.S. 591	19
Rasmussen v. *American Dairy Association,* (1973) 472 F.2d 517 (9th Cir.)	13
Rice v. *Alcoholic Bev. etc. Appeals Board,* (1978) 21 Cal.3d 431	10
Rice v. *Norman Williams Co.,* (1982) 458 U.S. 654	9
Sun Valley Disposal Co. v. *Silver State Disposal Co.,* (1969) 420 F.2d 341 (9th Cir.)	12
Town of Hallie v. *City of Eau Claire,* (1985) ____ U.S. ____, 53 U.S. Law Week 4418 (3/27/85)	17
United States v. *Webster,* (1984)	8
Wilson v. *Brown,* (1943) 137 F.2d 348	19, 20

RELEVANT STATUTES INVOLVED

	PAGE(S)
California Government Code §65300	14, A-2-1
California Government Code §65300.7	14, A-2-1
California Government Code §65302(c)	14, A-2-1
California Government Code §65580	15, A-2-1
California Government Code §65581	15, A-2-2
California Government Code §65583	15, A-2-3
California Government Code §65589(b)	16, A-2-5
California Government Code §65589(c)	16, A-2-5
California Health & Safety Code §50202	17, A-2-6
California Health & Safety Code §51852.5(a)	17, A-2-6
California Health & Safety Code §1518	17, A-2-6
Local Government Antitrust Act (1984), 15 U.S.C. §35	5, A-2-7
Sherman Antitrust Act, 15 U.S.C. §§1	9, A-2-9

No. 84-1538

IN THE

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Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appellees hereby move the Court to dismiss the appeal, on the ground that the appeal presents no substantial federal question, or to affirm the judgment of the California Supreme Court in this case.

THE ORDINANCE INVOLVED

On June 3, 1980, the electorate of the City of Berkeley, California, enacted an initiative measure called "Measure D," which was entitled "Rent Stabilization and Eviction for Good

Cause Ordinance." A copy of this Ordinance appears at page A-109 of Appellants' Appendix to their Juridictional Statement.

Section 3 of the Ordinance sets out its purpose: to protect tenants from unwarranted rent increases and arbitrary evictions brought on by the city's housing crisis, and to help maintain the diversity of the Berkeley community (i.e., to prevent minority and low-income people from being forced out of Berkeley by high rents).

Section 5 exempts from the ordinance government-owned units, transient units, cooperatives, certain small owner-occupied buildings, and all newly-constructed buildings.

Section 6 provides for a Rent Stabilization Board, made up of nine commissioners. Subsection (q) provides a means of ending rent control if the vacancy rate rises above 5%.

Sections 10 through 12 provide for rent increases. Section 10 says the starting point (or "base rent") is whatever rent the landlord was charging on May 31, 1980. From there, there are two ways in which he may receive permission to increase rents. First, §11 requires the Board annually to consider general, across-the-board rent increases for all landlords, to cover general cost increases. Second, if a particular landlord is not satisfied with the general increase, he may utilize §12 to petition the Board for an additional, individual increase. In ruling on this individual petition, the Board is required to take into account many factors (§12, subsection (c)), but in no event shall it deny a rent increase needed to allow the landlord a 'fair return on investment' (§12, subsection (i)).

Section 15(a) sets out remedies for violations of the rent control provisions of Measure D. Section 18 provides for judicial review of any act of the Board.

THE PROCEEDINGS BELOW

Appellants, a group of Berkeley landlords, filed suit on August 19, 1980, challenging the validity of the Ordinance. A copy of Appellants' complaint appears as Appendix 1 to this motion.

The complaint sets out several grounds on which the Ordinance is alleged to be unconstitutional on its face. (The complaint also states that the Ordinance is unconstitutional in its application, but alleges no facts in support of this conclusion.)

The complaint does *not* claim that the Ordinance is preempted by the Sherman Antitrust Act (15 U.S.C. §1)—even though the complaint was filed more than a year after this Court held that actions of cities are not always exempt from the Sherman Act, in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).[1]

Thus, the complaint alleges no facts which would support a finding that the Ordinance imposes a significant effect on interstate commerce. Also, the complaint alleges no facts which would support a finding that the enactment of the Ordinance was the result of any *conspiracy* to restrain trade. Nor does the complaint allege any facts regarding the extent of any anticompetitive effects of the Ordinance.

On October 10, 1980, the trial court granted Appellees' motion for judgment on the pleadings. Appellants' Appendix, page A-105. This order granted Appellants leave to amend their complaint. Appellants did file an amended complaint on November 6, 1980, but they voluntarily dismissed it on July 10, 1981.

Appellants appealed to the California Court of Appeal, First District, which reversed. The California Supreme Court granted a hearing and affirmed the trial court's ruling, upholding the validity of the Ordinance (except for a part of one provision on burden of proof, which the Court held to be preempted by state law.) *Fisher* v. *City of Berkeley*, 37 Cal.3d 644 (reprinted at Appellants' Appendix A-1).

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[1] Appellants have claimed that their failure to include such a contention in their complaint should be excused because there is a "home rule" provision in the California Constitution, and—until 1982—they did not realize that such a provision would not satisfy the "state action" exemption. (In 1982, this Court so held in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982)). *Lafayette's* failure to address this issue, however, did not deter the plaintiffs in *Boulder* from raising the issue—prior to this Court's ruling in *Boulder*.

Appellants then filed their Jurisdictional Statement in this Court.

ARGUMENT

I. APPELLANTS' SHERMAN ACT ARGUMENT DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

A. The California Supreme Court Fairly Resolved the Sherman Act Issue

In footnote 20 of its opinion in *Boulder*, this Court made it clear that its holding related *only* to the question of whether cities may invoke a "state action" *exemption* from the Sherman Act, *not* the question of what would constitute an antitrust *violation* by a city.

> We hold today *only* that the *Parker* v. *Brown* exemption was no bar to the District Court's grant of injunctive relief. This case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants. As we said in *City of Lafayette*, '[i]t may be that certain activities which might appear anticompetitive when engaged in by private parties, *take on a different complexion when adopted by a local government.*' 435 U.S., at 417, n.48

Community Communications Co. v. *City of Boulder, supra*, 455 U.S. at 56, n.20; emphasis added.

This statement was apparently an attempt to allay the fears expressed in Justice Rehnquist's dissent (joined in by the Chief Justice and Justice O'Connor) that the Court's holding on state action exemption would "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare. . . ." *Id.* at 60.

In its opinion below, the California Supreme Court did *exactly* what was strongly suggested by this Court in its footnote 20 in *Boulder*. The California Supreme Court held that —*assuming* the Ordinance was not protected by state action immunity—the "different complexion" of cities' regulations of business required a different (but *not* non-existent) standard under the *substantive* provisions of the Sherman Act. After an

exhaustive discussion and exploration of this Court's antitrust opinions, the Court stated:

> We conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 or 2 of the Sherman Act unless the plaintiff demonstrates that the city's purpose could be achieved as effectively by means that would have a less intrusive effect on federal antitrust policies.

Appellants' Appendix, p. A-2.

Appellants characterize this standard as "a blanket exemption from antitrust requirements for municipal governmental action." (Jurisdictional Statement, p. 16). It is not. It is simply a fair accommodation between two interests recognized by this Court in *Lafayette* and *Boulder:* that cities should not always be exempt from antitrust laws, and that cities' regulations for the protection of the public should not be judged by the same standards which are applied to private businesses.

We submit that the decision of the California Supreme Court was correct and should be summarily affirmed.

B. Because the Record in This Case is So Sparse, This Case is Not a Suitable Vehicle for Resolution of Important Antitrust Issues by This Court

We agree that the question of what substantive antitrust standard applies to non-exempt municipal legislation is an important one. (We note, however, that it is now much less important than it was when *Lafayette* and *Boulder* were decided. This is because of the recent enactment of the Local Government Antitrust Act of 1984, 15 U.S.C. §35, Public Law 98-544, which removed the threat of antitrust damage awards against cities in the future.)

But—where possible—an important question should not be decided in the abstract, without the benefit of a specific factual setting in which the question arises. Here, however, the record fails to provide that setting. There is *no* evidence in the

record regarding any potential anticompetitive effects of the Ordinance. Indeed, the complaint fails even to *allege* such effects.

At page 11, footnote 12, of their Jurisdictional Statement, Appellants claim that a factual inquiry would reveal that the Ordinance has "significant anticompetitive impacts." They assert that this is "clear," and they base this on language quoted from the dissent in the court below. The dissent, however, cites several alleged effects of "rent control": that "rent control" may set rents too low to permit adequate services and facilities, that "rent control" discourages market entry, and that "rent control" has a negative impact on the production of new housing.[2]

But these *general* assertions regarding "rent control" do not necessarily apply to the *specific* ordinance at issue in this case: Berkeley's Measure D. In fact, certain provisions in the Ordinance itself make it highly doubtful that it would have the asserted anticompetitive effects.

Section 10 sets the base rent as the rent established by the landlord (Appellants' Appendix, p. A-122), and §§11 and 12 allow the landlord to increase rents to recover cost increases. Appellants' Appendix at pp. A-123 to A-131. This should be enough to enable the landlord to provide services and facilities on a competitive basis. There is *nothing* in the record which indicates that Berkeley landlords do not compete through such services and facilities to obtain what they see as the most stable, credit-worthy, and well-behaved tenants.

Section 5(i) of the Ordinance exempts all newly constructed rental units from rent stabilization. Appellants' Appendix, p. A-114. This makes it highly doubtful that the Ordinance has discouraged market entry and new housing production. Once again, there is no evidence (or even allegations) in the record regarding this issue.[3]

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[2] These assertions are *not* universally accepted and are the source of much debate, but we will not continue that debate here.

[3] Appellants also claim, at page 15, footnote 14 of their Jurisdictional Statement, that the Ordinance's exemption of City-owned rental units from its scope enables Berkeley to engage in "predatory activity by the city as a market participant." The record fails to disclose, however, either allegations or evidence of the number of rental units owned by the City whose rents are not already controlled by federal regulations covering subsidized housing.

Appellants proclaim that the outcome of a factual inquiry into these questions would be "clear," but we do not share their confidence. This Court should not be required to resolve important issues on factual speculation instead of a factual record.

Appellants might respond by invoking cases which hold that price-fixing by private businesses almost always has significant anticompetitive effects. But it is *not known* whether the same can be said for municipal regulation of local business activities. Indeed, this question will undoubtedly be one of the key issues this Court will address when it faces (in a proper case) the question of what antitrust standards should apply to cities. By "proper case," we mean a case in which a proper record is made regarding any alleged anticompetitive effects of the specific ordinance under review. The case at bench does not include such a record.

C. This is the First Case Wherein a Lower Court Has Decided What Antitrust Standard Should Apply to Municipal Regulations for the General Protection of the Public. This Issue Has Had No Opportunity to "Percolate" through the Lower Courts.

In its opinion in this case, the California Supreme Court noted that:

> [T]his case forces us to wander off the map and travel cross country without the benefit of trail or compass. Although *Boulder* clearly held municipalities subject to antitrust laws, the court specifically declined to address the issue of the applicability of traditional antitrust rules or standards against which municipal defendants are to be judged.

Appellants' Appendix, p. A-15.

To our knowledge, the map includes no signposts from other state or federal courts which might have helped the Court in its quest. No case has come to our attention—before or after the California Supreme Court's opinion—which addresses the issue ruled upon by the California Supreme Court.

Many cases have explored the question of when cities may qualify for state action exemption under *Lafayette* and *Boulder*, yet none but the opinion below has gone past the exemption issue to the matter of substantive standards.

Thus, the intellectual input available to this Court on a very difficult issue is presently quite limited. Not enough time has passed to allow cases on this issue to rise to the intermediate appellate level (or, apparently, even the federal district court level). No "percolation" of the issue through the courts has yet occurred.

The value of such percolation was discussed in a recent article:

> *It is no accident that Justices with widely differing views of the Court's proper role in the American system of government have lauded the values of percolation in both constitutional and statutory cases.* Indeed early in 1984 all members of the Court joined in an opinion[4] rejecting a rule that would have allowed nonmutual collateral estoppel against the federal government on the ground that '[a]llowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeal to explore a difficult question before [the Supreme] Court grants certiori.'

Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?* 11 Hastings Constitutional Law Quarterly 375, 406 (1984); emphasis added.[5]

The Court should defer consideration of the issue raised by Appellants until more lower courts (and commentators) have had a chance to struggle with this thorny problem.

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[4] *United States* v. *Webster*, ____ U.S. ____, 104 S.Ct. 568, 572 (1984).

[5] The author also observed that

> [i]t is particularly important to note that in the Justice's eyes the value of the process is not limited to constitutional cases: 'This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task, as well as having underscored the reasonableness of the agency view.' *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, at 136, n.26 (1977)

11 Hastings Constitutional Law Quarterly, *supra*, at 406, n.135.

D. Even If the California Supreme Court's Reasons for Affirming the Trial Court Were Incorrect, Its Ruling was Correct on Other Grounds

"In general, an appellee may urge any argument in support of the judgment in his favor, whether or not that argument was accepted by the court below. . . ." Stern & Gressman, *Supreme Court Practice*, p. 537 (5th Ed., 1978).

In this case, there are *several* arguments which support the California Supreme Court's judgment affirming the trial court's judgment on the pleadings. Each of these arguments was presented to the California Supreme Court, but that Court felt it unnecessary to address them, because the trial court judgment should be affirmed on the basis that the Ordinance did not constitute an unreasonable restraint on trade. Appellants' Appendix, pp. A-12 to A-15.

1. No Conspiracy was Present In the Enactment or Enforcement of the Berkeley Ordinance.

For conduct to violate § 1 of the Sherman Act, such conduct must constitute a "contract, combination...or conspiracy."

> [T]here is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy' between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. §1. Independent action is not proscribed.

Monsanto Co. v. *Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464, 1469 (1984).[6]

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[6] Appellants have argued that they need not show a conspiracy where they seek no damages, but only to have an ordinance declared preempted by the Sherman Act. But this Court has held that such preemption occurs only if a state law involves "a violation of the antitrust laws." *Rice* v. *Norman Williams Co.*, 458 U.S. 654, at 661 (1982). There can be no violation of §1 of the Sherman Act without a conspiracy. Appellants have also argued that the Ordinance makes the City of Berkeley a monopolist under §2 of the Sherman Act, which does not require a conspiracy. But one must be a *competitor* in the relevant market to be a monopolist. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1945). There are no allegations of facts in Appellants' complaint showing that the City of Berkeley is a significant competitor in Berkeley's rental housing market.

In the case at bench, the complaint alleges merely that the Ordinance was enacted by the City of Berkeley, through its electorate, i.e., by unilateral action. It is not alleged that the City conspired with anyone to enact the Ordinance. Even if there were a group of voters or supporters of the proposed Ordinance working among themselves or with the City to secure the enactment of the Ordinance, such combinations would not violate the Sherman Act, as "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Eastern R.R. Conference* v. *Noerr Motor Freight*, 365 U.S. 127, at 135 (1961).

Nor could any illegal conspiracy exist between the City of Berkeley and the other two Defendants named in the complaint—the Berkeley City Council and the Berkeley Rent Stabilization Board. These bodies are merely administrative units within the City's governmental structure. They are like unincorporated divisions of a corporation, which are not considered separate entities for conspiracy purposes. *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978). Even if these bodies had been separately incorporated, they still would be legally incapable of conspiring with their "parent corporation"—the City of Berkeley. *Copperweld Corp.* v. *Independence Tube Corp.*, ____U.S.____, 104 S.Ct. 2731 (1984).

Before the California Supreme Court, Appellants also argued that the Rent Board would conspire *with landlords* by compelling them to limit their rent increases. But the cases relied upon by Appellants all involved conspiracies between *private* parties—producers and retailers—which a statute has compelled or authorized. *None* of these cases held that there is a conspiracy between the *government agency* (which is not a producer and has no commercial interest in the matter regulated) and one of the private parties. *See, e.g., Rice* v. *Alcoholic Bev. etc. Appeals Board*, 21 Cal.3d 431 (1978).[7]

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[7] An amicus who appeared before the California Supreme Court—the California Apartment Association—claimed that the Ordinance created a conspiracy between the Rent Board and *tenants*, in that the Ordinance requires the Board to hear petitions filed by tenants regarding illegal rent increases and the like. But we are aware of no case holding or implying that a

(Footnote continued on following page)

2. Appellants Have Failed to Allege or Prove that the Berkeley Ordinance Imposes a Significant Effect on Interstate Commerce

Appellants' complaint contains no allegations of facts which would show that the Ordinance significantly affects interstate commerce. Such allegations are *essential* to state a cause of action under the Sherman Act. *McClain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 242 (1980).

Instead, Appellants now rely on a bold assertion that "it is without question" that "the rental housing industry" significantly affects interstate commerce, because "the rental housing industry" is "intertwined" with "interstate finance, construction and materials industries and the interstate movement of people and business." Jurisdictional Statement, p. 9, n.11. Such general contentions, however, probably would not have satisfied this Court's requirements even if they had appeared in Appellants' complaint.[8]

(Footnote continued from preceding page)

citizen's assertion of rights or "cooperation" under an otherwise valid law creates a conspiracy (legal or illegal) between the citizen and the government agency responsible for enforcing the law. In *Monsanto Co.* v. *Spray-Rite Corp., supra*, ____ U.S. ____, 104 S.Ct. 1464, this Court specifically refused to hold that a manufacturer's response (terminating a distributor) to complaints from competing distributors constituted a conspiracy under §1 of the Sherman Act because "[p]ermitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." *Id.* at 1470. Here, likewise, a conspiracy between the Rent Board and tenants cannot be inferred merely from the fact that the Ordinance provides procedures by which tenants may complain to the Rent Board and the fact that the Rent Board responds to such complaints. If the Ordinance is otherwise lawful, a holding that such a conspiracy existed "could deter or penalize perfectly legitimate conduct." *Id.* at 1470.

[8] "Although the cases demonstrate the breadth of Sherman Act prohibitions, jurisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the Defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce."

McClain v. *Real Estate Bd. of New Orleans, supra*, 444 U.S. at 242.

In any event, it is far from clear that Appellants could have proved that the Ordinance imposes any significant effect on "interstate finance, construction and materials industries and the interstate movement of people and business." The Ordinance, at §5(b), specifically exempts from its coverage housing units in hotels and motels, which might be used by interstate travelers. Appellants rely on an alleged effect of the Ordinance on "interstate financing" of the construction of apartment houses, but §5(i) of the Ordinance exempts new construction from its coverage. *If* it were shown that interstate lenders feared that Berkeley would enact *new* legislation imposing rent control on new construction, such fears would *not* be caused by the Ordinance itself, but by whatever real or imagined economic and social forces in the community which might cause the enactment of such new legislation.

Even if the Ordinance had some effect on interstate financing, it is questionable whether an effect on only one aspect of rental housing would constitute a "significant effect" on interstate commerce, when virtually every other aspect of rental housing in Berkeley is purely local. The rental units themselves are all located within the community. The tenant market—residents of Berkeley and other nearby communities—is almost entirely local. The amenities of each unit which are due to its location (proximity to schools, jobs, transportation, etc.) are purely local. The utilities (heat, water, electricity, etc.) are local. Repairs are performed by local personnel. Management companies are locally based. Where a local activity has only a few aspects which involve interstate commerce, the cases hold that this does not constitute a significant effect on interstate commerce under the Sherman Act. *See Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) (fact that garbage cans moved in interstate commerce did not mean that local garbage collection services had significant effect on interstate commerce); *Page* v. *Work*, 290 F.2d 323 (9th Cir. 1961) (fact that newspaper used supplies moving in interstate commerce did not mean that legal advertising in newspaper had significant effect on interstate

commerce). *Compare Rasmussen* v. *American Dairy Association,* 472 F.2d 517, 526-528 (9th Cir. 1973) (where *all* of milk products' significant ingredients derived from a line of interstate commerce, effect was sufficient to establish jurisdiction under the Sherman Act).

Because Appellants failed to allege facts showing any significant effect on interstate commerce—even after the trial court allowed them to amend their complaint—the California Supreme Court's judgment that Appellants had failed to allege a violation of the Sherman Act was correct.

3. California Statutes Contemplate that California Cities May Enact Rent Control Ordinances. Therefore, Berkeley's Enactment of the Ordinance is Exempt from Coverage of the Sherman Antitrust Act

In *City of Lafayette* v. *Louisiana Power & Light Co., supra,* this Court held that a city possesses "state action" immunity from antitrust actions where "the State authorized or directed a given municipality to act as it did." 435 U.S. at 414. The Court made it clear, however, that the city need not point to statutes expressly describing the city's power to undertake the specific action which is challenged:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. . . . [A]n adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, *that the legislature contemplated the kind of action complained of.*'

Id. at 415; emphasis added.[9]

[9] Professor Areeda explains the rule thusly:

> "*Lafayette* does not require that governmental acts be 'compelled' or 'supervised' by the state. Rather, it demands that the legislature have authorized the challenged activity with an intent to displace the antitrust laws. Unfortunately, state statutes seldom speak with clarity on either matter. In practice, therefore, express statements of authority or intent cannot be required. The Supreme Court has found it sufficient that 'the

(Footnote continued on following page)

In *Community Communications Co.* v. *City of Boulder, supra,* 455 U.S. 40, this Court held that a general "home rule" provision in state law does *not* show that "the legislature contemplated the kind of action complained of." (quoting *City of Lafayette* v. *Louisiana Power & Light Co., supra,* 435 U.S. 389.) "A state that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Community Communications Co.* v. *City of Boulder, supra,* 455 U.S. at 56.

The State of California, however, does *not* allow cities to "do as they please" regarding housing. The State *compels* our cities to take measures to expand housing opportunities for all citizens, and it contemplates that rent control may be one of the measures adopted to further this policy.

California Government Code §65300 mandates that every California city shall adopt a general plan.

The legislature recognized, however, that cities should have the discretion to decide which measures would best carry out the general plan in each locality.

Cal. Govt. Code §65300.7 provides that: "The Legislature finds that the diversity of the state's communities and their residents requires planning agencies and legislative bodies to implement this article in ways that accommodate local conditions and circumstances while meeting its minimum requirements."

Cal. Govt. Code §65302(c) provides that every general plan shall include "a housing element."

(Footnote continued from preceding page)

> legislature contemplated the kind of action complained of.' A policy to displace the antitrust laws will then be inferred if the challenged restraint or competition is a necessary or reasonable consequence of engaging in the authorized activity."
>
> Areeda, *Antitrust Immunity for "State Action" After Lafayette,* (1981) 95 Harv.L.Rev. 435, at 445-446. *See, also, Duke & Company, Inc.* v. *Foerster,* 521 F.2d 1277, 1280 (3d Cir. 1975) (state's intent to permit restraint of competition "may be demonstrated by explicit language in state statutes *or may be inferred from the nature of the powers and duties given to a particular governmental entity.*" (Emphasis added.)

There are several statutes dealing specifically with the housing element.

Cal. Govt. Code §65580 provides, in part:

* * *

(d) Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing *to make adequate provision for the housing needs of all economic segments of the community.* (Emphasis added.)

Cal. Govt. Code §65581 provides, in part:

> It is the intent of the Legislature in enacting this article:
>
> * * *
>
> (c) *To recognize that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal,* provided such a determination is compatible with the state housing goal and regional housing needs. (Emphasis added.)

Cal. Govt. Code §65583 provides, in part:

> The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes, *and shall make adequate provision for the existing and projected needs of all economic segments of the community.* (Emphasis added.)

It is apparent from these statutes that the Legislature has required each California city to take measures to improve the housing situations of "all economic segments of the community," and that the Legislature has contemplated that the cities themselves will decide what specific measures will best "accomodate local conditions and circumstances."

The California Legislature has expressed great concern for the housing needs of all economic levels of each community, and the State has left cities with a range of options concerning how best to provide for these needs. Reason able rent control ordinances have been among these options since the California Supreme Court's decision in *Birkenfeld* v. *City of Berkeley,* 17 Cal.3d 129 (1976).

The statutes which require cities to prepare and carry out housing elements were not intended to grant new powers to cities or take away powers which cities already have; these statutes merely require cities to utilize whatever *existing* powers they have and *focus* them in such a way as to try to meet the housing needs of all economic segments of the community. This intent is shown by Cal. Govt. Code §65589, subsections (b) and (c):

> (b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.
>
> (c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.

Subsection (b) shows that the Legislature contemplated that rent control might be one of the measures adopted by cities to fulfill their housing element duties. This provision, enacted in 1980, recognizes that the *grant* of authority for cities to enact rent control comes not from the Legislature but from the state Constitution, Article XI, section 7 (as was held in 1976 in *Birkenfeld, supra,* 17 Cal.3d at 140), and that the *repeal* of such authority can therefore come only from the electorate, not the Legislature.

The Legislature has enacted several other statutes which contemplate that cities may choose to adopt rent control. The Legislature has specifically exempted several state-supervised programs from local rent controls, including the California

Housing Finance Agency program (*see* California Health & Safety Code §50202), state mortgage insurance (*see* California Health & Safety Code §51852.5(a)), and licensed community care facilities (*see* California Health & Safety Code §1518(b)).

It should be noted that there has been *no reason* for the California Legislature to do *more* than "contemplate" that California cities might enact rent control ordinances. In 1976, the California Supreme Court held that cities' powers to enact rent control stem from the state Constitution, not the Legislature. *Birkenfeld, supra,* 17 Cal.3d 129. As the Legislature has been powerless to expand or repeal the authority of cities to enact rent control laws, any legislative attempts to "authorize" or "mandate" rent control ordinances would have been meaningless gestures. *Lafayette* and *Boulder* require only that the Legislature "contemplate the kind of action" taken by the city, and this has happened in the case at bench.

Measure D was enacted by the City of Berkeley in order to fulfill Berkeley's state-mandated obligation to carry out a housing element which makes adequate provision for all economic segments of the community. The Ordinance itself expressly acknowledges this, in §§2(a) and 3.

In its recent decision in *Town of Hallie* v. *City of Eau Clair,* ____ U.S. ____, 53 U.S. Law Week 4418 (3/27/85), this Court held that when a city's action is a "foreseeable result" of state enabling statutes, that is sufficient to show that the state "contemplated the kind of action complained of."

In California, reasonable rent stabilization ordinances[10] are foreseeable results of our legislature's *requirements*[11] that our cities and counties provide for the housing needs of all economic segments of the community. The California Legislature has thereby "contemplated the kind of action" which the

[10] About 50 California communities have some form of rent regulation ordinance, ranging from large cities such as Los Angeles and San Francisco down to small towns which regulate rents for spaces in mobilehome parks.

[11] Note that in *Town of Hallie,* the Wisconsin legislation was merely *permissive,* not mandatory, and yet this Court held that the state action exemption applied. The Court noted that "compulsion affirmatively expressed may be the best evidence of state policy." 53 U.S. Law Week, *supra,* at 4421.

City of Berkeley took when it enacted Measure D. Therefore, this enactment is immune from attack under the Sherman Act.

Although the California Supreme Court deferred this issue (Appellants' Appendix, p. A-12), its judgment is correct on this ground also.

E. Summary Affirmance or Dismissal Here Will Have Little or No Precedential Effect on Lower Courts

At page 8, footnote 10 of Appellants' Jurisdictional Statement, they claim that "lower courts would be required to consider a summary disposition as binding precedent of this Court." They cite authorities holding that such a summary disposition would be a disposition on the merits.

While a summary disposition might be a ruling "on the merits," what "merits" may have been ruled upon might be far from clear. The Chief Justice has noted: "When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached .... Another common response to summary affirmances of three-judge-court judgments is confusion as to what they actually do mean." *Fusari* v. *Steinberg* 419 U.S. 379, at 391-392 (1975).[12]

Here, in addition to the reason given by the California Supreme Court, we have shown three additional reasons why that Court's judgment was correct. Should this Court grant our motion to summarily affirm or dismiss, this Court's ruling will be opaque indeed. No lower court will be able to discern which of the four grounds formed the basis for this Court's ruling. Therefore, no court will be obliged to follow the California Supreme Court's reasoning as an adopted ruling of this Court.

II. APPELLANTS' CLAIM THAT THE BERKELEY ORDINANCE IS CONFISCATORY DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

Section 11 of the Ordinance provides for annual *general* rent increases for all landlords in the city, based on an estimate

[12] *See, also,* Stern & Gressman, *Supreme Court Practice* p. 332 (5th Ed. 1978): "Just what the Supreme Court *per curiam* dispositions hold often presents a problem for the lower courts. The Justices themselves have noted that such decisions are often 'somewhat opaque.' "

of how much most landlords' costs have risen. Section 12 allows landlords to petition for an *additional* rent increase on an individual basis, and the Rent Board is instructed to consider several factors when reviewing these petitions. However, subsection (i) of §12 grants an additional protection to landlords: "No provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a *fair return on investment.*" (Emphasis added.)

Appellants want more. They claim that the Constitution assures them a fair return on the *market value* of the property.

To our knowledge, however, *every* court which has addressed this issue—including this Court—has held that a return on investment standard is constitutional.

In *Power Comm'n* v. *Hope Gas Co.*, 320 U.S. 591 (1944), this Court expressly allowed a rate of return based upon a company's *investment. Id.* at 603-605. The Court also expressly rejected a contention that fair return on *value* was constitutionally required. "The heart of the matter is that rates cannot be made to depend on 'fair value' when the value of the going enterprise depends on the earnings under whatever rates may be anticipated." *Id.* at 601. Return on investment was also the standard used in *Penn. Central Transp. Co.* v. *New York City*, 438 U.S. 104, 136 (1978).

The circularity problem was also recognized in *Wilson* v. *Brown*, 137 F.2d 348 (1943), a case involving rent control: "The use of market value as a test is inconsistent with the regulation of rents, because the value of the property on the market depends in large measure upon its earnings and inflated rents result in inflated market values." *Id.* at 353. *See, also, Niles* v. *Boston Rent Control Administrator*, 374 N.E.2d 296, 301 (Mass.App. 1978); *Helmsley* v. *Borough* of Fort Lee, 78 N.J. 200, 394 A.2d 65, 72 (1978).

Appellants contend that the circularity problem could be avoided if one allows a fair return on the value as of the date the Ordinance was enacted. Jurisdictional Statement, p. 24. But they suggest no ways of resolving the difficult problems of determining just what the fair market value of a piece of

property is. (These problems were discussed in *Helmsley* v. *Borough of Fort Lee, supra,* 394 A.2d at 72, and *Wilson* v. *Brown, supra,* 137 F.2d at 353.) Determining fair market value at some *earlier* date than the present would be even *more* difficult, more expensive, and less reliable. No case holds that such a standard is constitutionally required.

Appellants contend that the Ordinance confiscates the unliquidated appreciation in the value of their properties. Jurisdictional Statement, p. 22. They appear to concede that this Court has held time and again that reasonable land use regulations which diminish unliquidated appreciation are constitutional.[13] But they attempt to distinguish those cases by saying that they involved only real property, whose value represents only "a mere potentiality or expectancy," while a landlord runs a business whose value "is based on its existing condition, not a future expectancy." But there is no allegation or evidence in the record supporting this latter assertion, and it runs counter to the experience in many communities (including Berkeley), where apartment houses have been sold at prices not justified by existing rents, in the expectation that rents can later be raised. In any event, Appellants cite no authority for their proposed distinction.

As interpreted by the California Supreme Court, the Ordinance allows landlords to increase rents to recover any loss in the purchasing power of their profits caused by inflation. Appellants' Appendix, pp. A-40 to A-43. But Appellants complain that they may secure permission to increase rents on this ground only by utilizing the individual petition procedure set

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[13] For example, in *Penn. Central Transp. Co.* v. *New York City, supra,* 438 U.S. at 130-131, this Court stated:

> [T]he submission that [plaintiffs] may establish a 'taking' simply by showing that they have denied the ability to exploit a property interest that they heretofore had believed was available for development is simply untenable....
>
> • • •
>
> [T]he decisions sustaining other land use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' see *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, (1926) (75% dimunition in value caused by zoning law); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (87½% diminution in value)....

out in §12 of the Ordinance, and they are unhappy with the delay this might involve. Jurisdictional Statement, pp. 25-26. However, as the California Supreme Court explained (Appellants' Appendix, pp. A-46 to A-52), the Ordinance contains more than adequate protections against unreasonable delays—including a 120-day limit on all decisions. Therefore, the Ordinance does *not prevent* the Rent Board from handling petitions expeditiously, so Appellants' *facial* attack on the Ordinance must fail. If and when a landlord shows that there was an unreasonable delay in his or her case, that will be the time to challenge the constitutionality of the Board's *application* of the Ordinance.

CONCLUSION

For any and each of the above-stated reasons, we submit that this Court should dismiss the appeal or affirm the judgment of the California Supreme Court in this case.

Dated: _____ Respectfully submitted,

Myron Moskovitz and
Zona Sage
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by _____
MYRON MOSKOVITZ*

* *Counsel of Record*

COMPLAINT **APPENDIX 1**

FILED
AUG 19 1980
RENE C. DAVIDSON, County Clerk
By _____
John A. Lazanco, Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

ALEXANDRA FISHER, an individual; MARGUERITE JACOBS, an individual; MORT BAKER, an individual; RICHARD LAWHORN, an individual; ANTHONY KERSHAW, an individual and LEVIN-ZEMEL, a corporation; on behalf of themselves and all others similarly situated;

Plaintiffs,

v.

THE CITY OF BERKELEY CITY COUNCIL; THE BERKELEY RENT STABILIZATION BOARD; DOES I through XX, inclusive,

Defendants.

No. 536602-6
COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIONS; DECLARATORY RELIEF

FIRST CAUSE OF ACTION

(Declaratory Relief)

1. Plaintiffs RICHARD LAWHORN, MORT BAKER, ALEXANDRA FISHER, and MARGUERITE JACOBS are, and at all times relevant have been, residents and voters of the City of Berkeley,

and the owners of apartment buildings located within that City and rented for residential purposes.

2. Plaintiff ANTHONY KERSHAW is and at all times relevant has been an owner of rental units in the City of Berkeley which are rented for residential purposes. Plaintiff LEVIN-ZEMEL is and at all times relevant has been a California corporation and the owner of an apartment building located in the City of Berkeley and rented for residential purposes.

3. At all times relevant, including within the past year, plaintiffs and each of them have paid taxes in and to the City of Berkeley.

4. Defendant City of Berkeley is a municipal corporation, a public entity and a Charter City, existing under the Constitution and laws of the State of California, located in the County of Alameda.

5. Defendant Berkeley City Council is composed of officers and agents of the City of Berkeley.

6. Defendant Berkeley Rent Stabilization Board is a board of Berkeley citizens created by and pursuant to the adoption of Measure D on the Berkeley municipal ballot for the June 3, 1980 election and appointed by the Berkeley City Council.

7. Plaintiffs lack information and belief as to the true names and capacities of defendants Does I through XX, and for that reason sue said defendants by said fictitious names. When their true names and capacities are ascertained, plaintiffs will amend this complaint by inserting their true names and capacities herein.

8. On November 7, 1978, the electorate of the City of Berkeley passed a Renter Property Tax Relief Ordinance.

9. On November 27, 1979, the Berkeley City Council passed an ordinance establishing a Temporary Rent Stabilization Program, effective until June 30, 1980.

10. On June 3, 1980, a majority (but less than 2/3) of voters in the City of Berkeley authorized to vote thereon and who voted, voted in favor of Measure D on the municipal ballot and thereby adopted and ordinance entitled "Adopting A Rent

Stabilization And Eviction for Good Cause Program", a true and correct copy of which is attached hereto as Exhibit A and incorporated herein by this reference. Said ordinance is hereinafter referred to as the "Ordinance." As a consequence, the Ordinance of its own terms, and without more, has become and is the subject of enforcement as law in the City of Berkeley and various acts and events have occurred and will occur including without limitation the following:

a. Within 30 days of adoption of the Ordinance, members of the Berkeley City Council appointed a Rent Stabilization Board ("the Board") to exercise certain powers and duties as set forth in the Ordinance.

b. The Ordinance and Board require that all landlords file with the Board by September 1, 1980 a rent registration statement for each rental unit covered by the Ordinance. The Board has formulated and issued detailed registration forms which the Ordinance requires owners to completely fill in and file with the Board no later than September 1, 1980.

c. a registration fee of twelve dollars ($12.00) per rental unit must be paid by the Owner to the Board no later than September 1, 1980.

d. Failure to file the registration statement and registration fee will result in imposition of an additional $12.00 penalty charge for each rental unit not registered.

e. After adoption of the Ordinance, it is unlawful to charge rent on a regulated rental unit in an amount greater than the lawful rent due and payable on May 31, 1980 in accordance with the provisions of the Temporary Rent Stabilization Program unless the Board sets a different rent in accordance with sections 11 and 12 of the Ordinance.

f. The Board may grant annual citywide rent increases or decreases based upon changes in costs of utilities, property taxes, and maintenance and operating expenses.

g. The intent of the Ordinance is to restrict the Board to grant rent increases only when the landlord demonstrates it is necessary to provide a landlord with a fair return on investment.

h. Special defenses, conditions precedent, causes of action and burdens of proof will be applicable to unlawful detainer actions, notwithstanding any existing state law or pre-existing agreements of the contracting parties to the contrary.

11. The Ordinance both on its face and in its application violates the Constitutions and laws of the United States and of the State of California. More particularly, the Ordinance:

a. Constitutes a taking of property for public use without just compensation and due process in contravention of the Fourteenth Amendment of the United States Constitution and Article I, section 19 of the California Constitution.

b. Constitutes a violation of the right to due process of law in contravention of the Fourteenth Amendment of the United States Constitution and Article I, section 7 of the California Constitution.

c. Constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution and Article I, section 7 and Article IV, section 16 of the California Constitution.

d. Constitutes a violation of the right of privacy of personal affairs in contravention of the Fourth Amendment of the United States Constitution, and Article I, section 1 of the California Constitution.

e. Constitutes an impairment of the obligation of contracts in contravention of Article I, section 10 of the United States Constitution and Article I, section 9 of the California Constitution.

f. Constitutes an attempt to regulate an area preempted by legislation of the State of California.

g. Constitutes an illegal restraint on alienation of real property in violation of legislation and public policy of the State of California.

h. Imposes a tax on the owners of residential rental property in the City of Berkeley in violation of Article XIIIA of the California Constitution.

12. An actual controversy has arisen and now exists between plaintiffs and defendants, and each of them, concerning their respective rights, duties and obligations under and arising out of the Ordinance. Plaintiffs contend that the Ordinance is unconstitutional, unlawful, and invalid on its face and in its operation and are informed and believe and thereupon allege that defendants, and each of them, dispute such contention and contend that the Ordinance is valid and enforceable in all respects.

13. Plaintiffs desire a judicial determination of the validity and enforceability of the Ordinance and the rights, duties and obligations of the parties with respect thereto.

14. Such a declaration is necessary and appropriate at this time in order that plaintiffs may ascertain their rights, duties and obligations under the Ordinance, to avoid great and irreparable injury to the parties, and to avoid a multiplicity of litigation with respect to the validity, enforceability, and meaning and effect of the Ordinance.

SECOND CAUSE OF ACTION

(For Injunction Against Enforcement)

15. Paragraphs 1 through 13, inclusive, of plaintiffs' First Cause of Action are incorporated herein by this reference.

16. Each of the plaintiffs herein currently leases rental units governed by the Ordinance.

17. The costs of operation of the rental units in Berkeley owned and leased by plaintiff RICHARD LAWHORN are now in excess of the rental income from those units and the "negative cash flow" to plaintiff LAWHORN is three hundred fifty dollars a month. When said units were acquired in 1977 the prevailing rents were such to permit plaintiff LAWHORN to "break even." Current restricted rent levels jeopardize the ability of said plaintiff to make payments on his mortgage loans and not to default on said payments.

18. Plaintiff ALEXANDRA FISHER purchased after January 1, 1980, a building in Berkeley which contains four (4) rental units, one of which she occupies. Plantiff FISHER is

unable with the current restricted rents to "break even" on her property payments and has a "negative cash flow" on said property. Plaintiff FISHER owns no other real property.

19. Plaintiff MARGUERITE JACOBS owns a five (5) unit building in Berkeley which she and her late husband had constructed in 1961 and prior to enactment of the Ordinance in her opinion and that of an appraiser had a fair market value of approximately $150,000. Said building in her opinion and that of an appraiser currently has an estimated fair market value of $117,000 as a result of the Ordinance.

20. Plaintiff LEVIN-ZEMEL, Inc. owns a building in Berkeley which said plaintiff's predecessor had constructed in the 1960's and with respect to which said plaintiff's equity is substantial when compared to a relatively small cash investment.

21. Plaintiff ANTHONY KERSHAW owns buildings in Berkeley which he purchased numerous years ago and has greatly increased the value of through thousands of hours of his own labor and improvements he has made thereon.

22. Absent the relief sought hereby:

a. No rent may be increased except by order of the Rent Control Board.

b. Plaintiffs and others similarly situated who desire to sell their rental units will be forced to sell said units at values greatly below the fair market value of said units prior to enactment of the Ordinance.

c. Many plaintiffs and others similarly situated who are in a "negative cash flow" position will not be able raise their rents sufficiently to reach a "break even" position.

d. From and after the adoption of the Ordinance plaintiffs are precluded from seeking or obtaining recovery of possession of their rental units except on the terms specified by section 13 and 14 of the Ordinance and will be subject to the terms of section15 of the Ordinance.

23. As a consequence of the foregoing, the Ordinance is unconstitutional and its enforcement will cause great and

irreparable injury to the plaintiffs, and each of them for the following reasons:

The rent freeze and restrictive future rent increases will result in a loss of income and revenues for plaintiffs and each of them. Such loss cannot, pursuant to the Ordinance be recouped through future increased rentals. The Ordinance mandates that all future rents be set by the Rent Board, which Board has no power to direct that tenants who had benefitted from frozen rents or rollback rents subsequently remit to the landlord the difference between such rents and the proper adjusted rent subsequently set by the Board. Nor does the Board have the power to subsequently set future rents at a rate which will recoup the lost rental for prior periods and/or from prior tenants nor to remit such amounts from its or the City's funds to injured lessors. The amount of such unrecoverable loss is undeterminable for the reason that the Rent Board need not conduct hearings or set rents until October 31, 1980 and December 31, 1980 respectively. Yet the freeze and other provisions will absent the relief here sought, be in effect at all times from and after the adoption of the Ordinance. In consequence, enforcement of the freeze and rent setting provisions of the Ordinance will constitute a violation of the constitutional guarantees herein enumerated.

THIRD CAUSE OF ACTION

(Injunction Against Waste of Funds)

24. Paragraphs 1 through 13, inclusive, of plaintiffs' First Cause of Action are incorporated herein by this reference.

25. The appointment of Board Members, as well as other actions and events more specifically set forth in the Ordinance, will from the date of adoption and thereafter require the expenditure of funds, time, and effort by the City of Berkeley.

26. In consequence of the foregoing, the individual defendants will, in the absence of the relief here sought, be required and obliged to expend and to authorize the expenditure of funds and property of the City of Berkeley in compliance with the Ordinance.

27. Such expenditures will be illegal and will constitute a waste of public monies for the reason that the Ordinance violates the Constitutions and laws of the United States and of the State of California as more particularly set forth in the First Cause of Action in this Complaint.

FOURTH CAUSE OF ACTION

(Injunction Against Violation of California Enviornmental Quality Act)

28. Paragraphs 1 through 27, inclusive of the Complaint are incorporated herein by this reference.

29. The California Environmental Quality Act (Public Resources Code section 21001, et seq.) requires that an environmental impact report must be prepared and filed prior to the direct undertaking of activities by a public agency, unless the activity is exempt by law.

30. The activities to be undertaken by the Berkeley Rent Stabilization Board pursuant to the Ordinance are not exempt from the requirements of the California Environmental Quality Act.

31. By failing and refusing to prepare and file an environmental impact report with respect to its activities under the Ordinance, the Berkeley Rent Stabilization Board is in violation of the California Environmental Quality Act and the Board's activities in administering the Ordinance must be enjoined.

WHEREFORE, plaintiffs pray:

1. For a declaration that the Ordinance is unconstitutional, invalid, and unenforceable, on its face and/or in its operative effect, and that none of the parties hereto have any right, duty or obligation to comply with the terms or provisions thereof.

2. For a preliminary injunction enjoining defendants, and each of them, and all those acting by, through, for, on behalf of, in concert with them, or pursuant to any of the

provisions of the Ordinance, during the pendency of this action, from authorizing or engaging in, directly or indirectly, the enforcement of the Ordinance in its entirety and/or any of the following provisions of the Ordinance: Sections 4(f), 11, 12(c) and (i), 14 and 15.

3. For a permanent injunction enjoining defendants, and each of them, and all those acting by, through, for, on behalf of, in concert with them, or pursuant to any of the provisions of the Ordinance, from authorizing or engaging in, directly or indirectly, the enforcement of the Ordinance in its entirety and/or any of the following provisions of the Ordinance: Sections 4(f), 8, 11, 12, 13, 14 and 15.

4. For a preliminary injunction enjoining the defendants and each of them and all those acting by, through, for, on behalf of, or in concert with them, during the pendency of this action, from authorizing, engaging in or performing, directly or indirectly, the expenditure of funds of the City of Berkeley to enforce, attempt to enforce, or comply with, each, any and/or all of the provisions of the Ordinance, and particularly, sections 4(f), 11, 12(c) and (i), 14 and 15.

5. For a permanent injunction enjoining the defendants and each of them and all those acting by, through, for, on behalf of, or in concert with them, from authorizing, engaging in or performing, directly or indirectly, the expenditure of funds of the City of Berkeley to enforce, attempt to enforce, or comply with, each, any and/or all of the provisions of the Ordinance.

6. For costs of suit, including reasonable attorneys' fees.

7. For such other and further relief as the court deems just.

Dated: DOBBS & NIELSEN

By _____
JAMES R. PARRINELLO, ESQ.,
Attorneys for Plaintiffs

APPENDIX 2

RELEVANT STATUTES INVOLVED

California Government Code

§ 65300. General plan for development

Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning. *Chartered cities shall adopt general plans which contain the mandatory elements specified in Section 65302.*

§ 65300.7. Legislative finding

The Legislature finds that the diversity of the state's communities and their residents requires planning agencies and legislative bodies to implement this article in ways that accommodate local conditions and circumstances, while meeting its minimum requirements.

(Added by Stats. 1980, c. 837, p. 2617, § 1.)

§ 65302

(c) A housing element as provided in Article 10.6 (commencing with Section 65580).

§ 65580. Legislative finding and declaration

The Legislature finds and declares as follows:

(a) The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order.

(b) The early attainment of this goal requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels.

(c) The provision of housing affordable to low- and moderate-income households requires the cooperation of all levels of government.

(d) Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.

(e) The Legislature recognizes that in carrying out this responsibility, each local government also has the responsibility to consider economic, environmental, and fiscal factors and community goals set forth in the general plan and to cooperate with other local governments and the state in addressing regional housing needs.

(Added by Stats.1980, c. 1143, p. 3697, § 3.)

§ 65581. Intent of legislature

It is the intent of the Legislature in enacting this article:

(a) To assure that counties and cities recognize their responsibilities in contributing to the attainment of the state housing goal.

(b) To assure that counties and cities will prepare and implement housing elements which, along with federal and state programs, will move toward attainment of the state housing goal.

(c) To recognize that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs.

(d) To ensure that each local government cooperates with other local governments in order to address regional housing needs.

(Added by Stats.1980, c. 1143, p. 3697, § 3.)

§ 65583. Contents of housing element

The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes, and shall make adequate provision for the existing and projected needs of all economic segments of the community. The element shall contain all of the following:

(a) An assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs. The assessment and inventory shall include the following:

(1) Analysis of population and employment trends and documentation of projections and a quantification of the locality's existing and projected housing needs for all income levels. These existing and projected needs shall include the locality's share of the regional housing need in accordance with Section 65584.

(2) Analysis and documentation of household characteristics, including level of payment compared to ability to pay, housing characteristics, including overcrowding, and housing stock condition.

(3) An inventory of land suitable for residential development, including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites.

(4) Analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels, including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, and local processing and permit procedures.

(5) Analysis of potential and actual nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the availability of financing, the price of land, and the cost of construction.

(6) Analysis of any special housing needs, such as those of the handicapped, elderly, large families, farmworkers, * * * families with female heads of households, and families and persons in need of emergency shelter.

(7) Analysis of opportunities for energy conservation with respect to residental development.

(b) A statement of the community's goals, quantified objectives, and policies relative to the maintenance, improvement, and development of housing.

It is recognized that the total housing needs identified pursuant to subdivision (a) may exceed available resources and the community's ability to satisfy this need within the content of the general plan requirements outlined in Article 5 (commencing with Section 65300). Under these circumstances, the quantified objectives need not be identical to the identified existing housing needs, but should establish the maximum number of housing units that can be constructed, rehabilitated, and conserved over a five-year time frame.

(c) A program which sets forth a five-year schedule of actions the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls, provision of regulatory concessions and incentives, and the utilization of appropriate federal and state financing and subsidy programs when available. In order to make adequate provision for the housing needs of all economic segments of the community, the programs shall do all of the following:

(1) Identify adequate sites which will be made available through appropriate zoning and development standards and with public services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including rental housing, factory-built housing, and mobilehomes, in order to meet the community's housing goals as identified in subdivision (b). *The program may include an identification of adequate sites for emergency housing.*

(2) Assist in the development of adequate housing to meet the needs of low- and moderate-income households.

(3) Address and, where appropriate and legally possible, remove governmental constraints to the maintenance, improvement, and development of housing.

(4) Conserve and improve the condition of the existing affordable housing stock.

(5) Promote housing opportunities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, or color.

The program shall include an identification of the agencies and officials responsible for the implementation of the various actions and the means by which consistency will be achieved with other general plan elements and community goals. The local government shall make a diligent effort to achieve public participation of all economic segments of the community in the development of the housing element, and the program shall describe this effort.

§ 65589. Construction of article

(a) Nothing in this article shall require a city, county, or city and county to do any of the following:

(1) Expend local revenues for the construction of housing, housing subsidies, or land acquisition.

(2) Disapprove any residential development which is consistent with the general plan.

(b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

(c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.

HEALTH AND SAFETY CODE

§ 50202. Construction of division; rent control

Nothing in this division shall authorize the imposition of rent regulations or controls except by a regulatory contract between the agency or the department, as the case may be, and its housing sponsor or developer, for housing units financed, insured, *coinsured* or otherwise assisted by the agency or by the department, as the case may be. Except for the federal government, the right to control rent on such units shall reside exclusively in the agency or the department, as the case may be, and the housing sponsor or developer so regulated shall not otherwise be subject to controls on rent imposed by any state or local agency or other local public entity.

§ 51852.5 Rental housing developments; exemptions

Notwithstanding any other provision of law:

(a) Any rental housing development which is financed from mortgages insured pursuant to this chapter shall be exempt from all of the following:

§ 1518. Rent control; exemption

(a) Nothing in this chapter shall authorize the imposition of rent regulations or controls for licensed community care facilities.

(b) Licensed community care facilities shall not be subject to controls on rent imposed by any state or local agency or other local government or entity.

PUBLIC LAW 98-544 [H.R. 6027]; October 24, 1984

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

An Act to clarify the application of the Clayton Act to the official of local governments, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1984".

SEC. 2. For purposes of this Act—

(1) the term "local government" means—

(A) a city, county, parish, town, township, village, or any other general function governmental unit established by State law, or

(B) a school district, sanitary district, or any other special function governmental unit established by State law in one or more States,

(2) the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(A)), but does not include any local government as defined in paragraph (1) of this section, and

(3) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

SEC. 3. (a) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

SEC. 4. (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.

SEC. 5. Section 510 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985 (Public Law 98-411), is repealed.

SEC. 6. This Act shall take effect thirty days before the date of the enactment of this Act.

Approved October 24, 1984.

Sherman Antitrust Act

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or consipiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 3. Trusts in Territories or District of Columbia illegal; combination a felony

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one

hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 4. Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

§ 5. Bringing in additional parties

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

§ 6. Forfeiture of property in transit

Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this title, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

§ 6a. Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

§ 7. "Person" defined

The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN AND ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' REPLY BRIEF TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

		Page
Table of Authorities		ii
I.	INTRODUCTION	1
II.	THE DECISION BELOW IS CONTRARY TO UNAMBIGUOUS HOLDINGS OF THIS COURT	1
III.	THERE ARE NO ALTERNATIVE JUSTIFICATIONS TO SUPPORT THE ERRONEOUS RULING BELOW	3
	A. The Ordinance Conflicts With The Sherman Act	3
	B. The Control Of Rental Rates Clearly Affects Interstate Commerce	4
	C. The State Of California Has No "Clearly Articulated And Affirmatively Expressed" Policy Authorizing Local Rent Control	6
IV.	PLENARY REVIEW IS NECESSARY TO AVOID CONFUSION IN THE LOWER COURTS	9
V.	THE CONFISCATION ISSUES ARE SUBSTANTIAL	9

TABLE OF AUTHORITIES

CASES: PAGE(S)

Albrecht v. *The Herald Co.*, 390 U.S. 145 (1968) 3
Birkenfeld v. *City of Berkeley*, 17 Cal.3d 129, 550 P.2d 1001, 130 Cal.Rptr. 465 (1976) 3
Burke v. *Ford*, 389 U.S. 320 (1967) 4
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 3, 8, 9
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 1, 2, 8, 9
Community Builders, Inc. v. *City of Phoenix*, 652 F.2d 823 (9th Cir. 1981) 5
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982) 1, 2, 7, 8, 9
Fisher v. *City of Berkeley*, 37 Cal.3d 644, 693 P.2d 261, 209 Cal.Rptr. 682 (1984) 2, 9
Goldfarb v. *Virginia State Bar*, 421 U.S. 733 (1975) 5
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 3
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 3
Mandeville Island Farm, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) 4
McLain v. *Real Estate Board of New Orleans*, 444 U.S. 232 (1980) 5, 6
Nash v. *Florida Industrial Comm.*, 389 U.S. 235 (1967) 3
Penn. Central Transp. Co. v. *New York City*, 438 U.S. 104 (1978) .. 10
Perez v. *United States*, 402 U.S. 146 (1971) 4
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) ... 4
Smith v. *Illinois Bell Telephone Co.*, 270 U.S. 587 (1926) 10
Town of Hallie v. *City of Eau Claire*, ____ U.S. ____, 53 U.S.L.W. 4418 (3/27/85) 1, 2, 7, 8, 9
Turf Paradise, Inc. v. *Arizona Downs*, 670 F.2d 813 (9th Cir., 1982), cert. denied, 456 U.S. 1011 (1982) 5
United States v. *Frankfort Distilleries*, 324 U.S. 293 (1945) 4
U.S. v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) 3
United States v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944) 5
Wickard v. *Filburn*, 317 U.S. 111 (1943) 4

STATUTES AND BILLS:

15 U.S.C. § 1 3
CAL. CONST. art. IV, § 8 3
CAL. CONST. art. IV, § 16 3
CAL. CONST. art. XI, § 7 ..... 2, 3
CAL. GOV'T CODE § 65580 (Deering) 6
CAL. GOV'T CODE § 65589(b) 7
CAL. GOV'T CODE § 65589(c) 7

I. INTRODUCTION

The Motion to Dismiss or Affirm ("Motion") is without merit and should be denied. Appellees seek to circumvent, as did the state court below, the clear holdings of several recent and important decisions of this Court. By mentioning only in passing the holding of the California Supreme Court, appellees seem to acknowledge that not even they can reconcile that court's reasoning with the controlling precedents of this Court. Indeed, appellees admit this case involves an "important antitrust issue" but nevertheless assert that no substantial federal question is presented. To the contrary, the erroneous opinion below, if allowed to stand, will eviscerate recent rulings of this Court, elevate parochial local interests over paramount federal economic policy and create chaos in the lower courts.

II. THE DECISION BELOW IS CONTRARY TO UNAMBIGUOUS HOLDINGS OF THIS COURT

In a less-than-spirited, four paragraph defense of the state court's opinion, Motion at 4-5, appellees argue only that the Sherman Act preemption issue was "fairly resolved" by the state court. Appellees' only defense is that the radical opinion below was "strongly suggested" in *dicta* in a footnote in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (hereinafter *"Boulder"*). Motion at 4. Appellees' reliance on one *Boulder* footnote to justify the decision below, which created a new and unprecedented rule of federal law, strains the imagination and stands recent rulings of this Court on their head.

The notion that municipalities have a blanket exemption from the Sherman Act was put to rest by this Court's decisions in *Boulder* and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (hereinafter "*Lafayette*"). Municipalities are exempt from the antitrust laws only if the challenged activity is engaged in pursuant to a "clearly articulated and affirmatively expressed" state policy. *Lafayette*, 435 U.S. at 410, 413; *Boulder*, 455 U.S. at 51-55. Additionally, where, as here, a municipal regulation of private parties is involved, active state supervision must be shown. *Town of Hallie v. City*

of Eau Claire, ___ U.S. ___, 53 U.S.L.W. 4418, 4421, n. 10 (3/27/85) (hereinafter "*Town of Hallie*"); *Lafayette,* 435 U.S. at 410; *Boulder,* 455 U.S. at 51, n. 14.

Yet there is no state policy in California authorizing rent control nor is there any active state supervision of appellees' price-fixing program. Even the state court below recognized this uncontrovertible fact, acknowledging that "California has no rent control statute." *Fisher v. City of Berkeley,* 37 Cal.3d 644, 655, 693 P.2d 261, 262, 209 Cal.Rptr. 682 (1984); Jurisdictional Statement Appendix ("J. S. App.") A at A-6.

Nor is there any state constitutional provision which "clearly articulates and affirmatively expresses" a state policy authorizing local rent control. Article XI, section 7 of the California Constitution, relied upon but not quoted by appellees, Motion at 16, merely states:

> A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

Boulder makes clear that such a generalized grant of authority is not a "clear articulation and affirmative expression" of state policy and does not immunize appellees from the Sherman Act.

To circumvent *Boulder* and attempt to justify the state legislature's silence and neutrality, appellees argue that there has been no express legislative authorization of rent control because "the [state] Legislature has been powerless to expand or repeal the authority of cities to enact rent control laws . . ." Motion at 17. Appellees' theorize that the above-cited section of the state Constitution provides general authority for municipalities to enact local laws including rent control and thus renders any state legislation on the subject "meaningless."

This argument, which is made for the first time in this Court, is demonstrably wrong and does not justify the Legislature's silence and neutrality. The California Legislature plainly has the power to authorize cities to engage in rent control or to prohibit them from doing so. Article XI, section 7, upon which appellees rely, specifically states that cities may only enact local ordinances which are "not in conflict with general laws." General laws are those enacted by the Legislature. CAL. CONST. art. IV, §§ 8, 16. State legislation plainly prevails over conflicting local ordinances enacted pursuant to Article XI, section 7. *Birkenfeld v. City of Berkeley* 17 Cal.3d 129, 140, 550 P.2d 1001, 1009, 130 Cal.Rptr. 465 (1976).

III. THERE ARE NO ALTERNATIVE JUSTIFICATIONS TO SUPPORT THE ERRONEOUS RULING BELOW

A. The Ordinance Conflicts With The Sherman Act.

Appellees' argument that the Ordinance involves no conspiracy and, therefore, cannot violate Section 1 of the Sherman Act, Motion at 9-10, is fatally simplistic in its failure to recognize the existence of the price restricting combinations created by the Ordinance and the fundamental conflict between this rent-fixing program and the Sherman Act.

In the case at bench, the Ordinance destroys price competition among owners of 23,000 rental units and compels participation in a far stronger and more forceful vertical price-fixing combination than any similar arrangement in the private sector. *Cf. U.S. v. Parke, Davis & Co.,* 362 U.S. 29 (1960); *Albrecht v. The Herald Co.,* 390 U.S. 145 (1968). This, in turn, inevitably results in a horizontal combination which precludes all landowners in Berkeley from engaging in price competition. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 103 (1980) (hereinafter "*Midcal*").

Yet the question is not whether the Ordinance is actionable under the Sherman Act; the Ordinance is preempted if it restricts vigorous price competition contrary to the pro-competition policies and goals of a federal law, in this case Section 1 of the Sherman Act (15 U.S.C. § 1). *See Hines v. Davidowitz,* 312 U.S. 52 (1941); *Jones v. Rath Packing Co.,* 430 U.S. 519, 526 (1977); *see also Nash v. Florida Industrial Comm.,* 389 U.S. 235, 239 (1967).

The fact that rent-fixing is accomplished by a governmental agency rather than by "purely" private action does not provide any defense to appellees. Indeed, a preemption challenge can only be addressed to governmental enactments, not private conduct. In *Midcal,* this Court recognized that a governmental program similar to appellees, vertically imposing price regulation on private parties, was preempted by the

Sherman Act and thus void. *See also Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).[1]

B. The Control Of Rental Rates Clearly Affects Interstate Commerce.

Appellees' contention that rent control of 23,000 units within the Berkeley city limits is strictly local, Motion at 11-13, portrays Berkeley as an island existing unto itself. In so arguing, appellees completely ignore the precedents of this Court concerning the expanse of Congressional power.

In an authoritative analysis of the reach of Congressional jurisdiction under the Commerce Clause, *Perez v. United States*, 402 U.S. 146, 150 (1971), held that interstate commerce was sufficiently involved in a single extortionate credit transaction which occurred wholly within one city. This Court ruled that—in enacting the federal law against "loan-sharking"—Congress attempted to use the full extent of its commerce power. As such, if the class of activity involved substantially affects interstate commerce then Congress can regulate the entire class and also reach individual incidents within the class even though that individual incident does not in and of itself affect interstate commerce. 402 U.S. at 153-154; *see Wickard v. Filburn*, 317 U.S. 111 (1943) (wheat grown by one farmer wholly for home consumption purposes affects interstate commerce). *Wickard* and *Perez* are unquestionably applicable to the appraisal of interstate commerce in antitrust cases. *Mandeville Island Farm, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Burke v. Ford*, 389 U.S. 320 (1967).

In enacting the Sherman Act, Congress "left no area of its constitutional power unoccupied; it exercised all of the power it possessed." *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945). More important to this case, the Sherman Act

[1] Professor Phillip Areeda described the principle thusly:

> It is exceedingly important to see that neither antitrust liability nor antitrust damages are necessary to hold, in any particular case, that the federal antitrust regime applies in preference to a federal or state regulatory effort. . . . Such conclusions are routinely reached without any finding that the federal agency or its officials have violated the antitrust laws or are liable for antitrust treble-damages . . . [Testimony at Official Proceedings of U.S. Senate Judiciary Committee, June 30, 1982.]

is intended to reach those restraints, such as the rent-fixing program here challenged, which occur wholly within one city or one state, but which substantially affect interstate commerce. *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944); *Goldfarb v. Virginia State Bar*, 421 U.S. 733 (1975); *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980) (hereinafter *"McLain"*).

Pursuant to the "effect on commerce" test, it need only appear that the impacted local activity, *e.g.*, the rental housing business, has a substantial effect on interstate commerce and it is not necessary that the particular restraint, *e.g.*, rent control, be shown to have an interstate commerce effect. The Court of Appeals recently stated in *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813 at 818 (9th Cir., 1982), *cert. denied*, 456 U.S. 1011 (1982):

> To meet the "effect on commerce" test, Turf need only allege that the local activity of horseracing has a substantial effect on interstate commerce, not the "more particularized showing" that the alleged illegal conduct, the lease provision, has a substantial effect on interstate commerce. (Citations.) There must be a "sufficient nexus" between the activity and interstate commerce so that it can be said "as a practical matter of economics" there is "a not insubstantial effect on the line of commerce involved." *Community Builders*, 652 F.2d at 827 (citing *McLain*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441).

Appellees' argument that its rigid price control scheme has an "insubstantial effect" on interstate commerce is tantamount to arguing that Congress does not have the constitutional power—under the Commerce Clause—to prohibit such pervasive anticompetitive conduct. Yet, there can be no doubt that a private conspiracy among Berkeley landowners to fix prices for all residential rental property in the city would be well within the reach of the Sherman Act; that the actor is the city does not change the impact of the price-fixing program on interstate commerce.

The Ordinance's effect on rental housing and thus interstate commerce is evident "as a practical matter of economics."

Moreover the complaint[2] alleged that the Ordinance substantially reduced the value of rental units in the city, prevented landowners from charging rents sufficient to meet their mortgage obligations and inhibited the sale and refinancing of their properties. Complaint, ¶¶ 16-22. The Ordinance directly affects the purchase, sale and refinancing of property; it discourages capital improvements thereby affecting financing and the interstate flow of goods and materials. Ordinance §§ 10-13; J.S. App. G at A-122-131; See also J.S. App. H at A-140-151.

In *McLain,* under much less compelling circumstances, this Court found the necessary effect on interstate commerce where artifically high real estate commissions caused the prices of residential property to be artificially raised. *Id.* at 235.[3] This Court recognized that whatever stimulates or retards the volume of home sales or impacts the purchase price, has an effect on financing and title insurance thereby affecting commerce. *Id.* at 246. The Ordinance at issue here goes much further and is clearly within Congress' reach.

C. The State Of California Has No Clearly Articulated And Affirmatively Expressed Policy Authorizing Local Rent Control.

Appellees, apparently recognizing the weakness of the decision below, now urge this Court to summarily affirm on the theory that certain general "housing" statutes of the State of California "contemplate" that cities will enact rent control ordinances. Motion at 13-18. Uncomfortable with the state court's conclusion that there is no state rent control statute, appellees point to a legislative scheme to plan and promote the *development* of housing and contend that it "contemplates" rent controls. Government Code section 65580, indeed the entire act relied upon by appellees, deals with "improvement and development" of housing stock and clearly does not authorize rent control. It merely calls for general plans to provide for

[2] Appellees incorrectly suggest, Motion at 13, that the trial court allowed an amendment to the cause of action in the complaint challenging the Ordinance on its face; in fact, the only amendment allowed was to the cause of action challenging the Ordinance as applied. J. S. App. at A-4. The complaint is reprinted as Appendix 1 to appellees' Motion.

[3] The complaint herein alleged that the Ordinance caused real estate prices to plummet.

development of low cost housing, not transmutation of existing housing to low cost housing via rent control. As appellees themselves argue, the Ordinance exempts new construction or development. Motion at 6.

Two things should be noted about section 65589(b) and (c) upon which appellees rely. First, rent control is dealt with separately and distinctly from those measures that might be used to implement local general plans. Subsection (c) expressly denies that the article grants or repeals any authority of local governments to undertake measures to implement general plans. Rent control is addressed separately in subsection (b), clearly indicating that rent control is considered something other than a "measure that may be undertaken . . . to implement the housing element of the local general plan."

Second, subsection (b) is an express declaration of *neutrality* on whether municipalities may engage in rent control; it provides:

> Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which *may* exist of a local government to impose rent controls or restrictions on the sale of real property. (Emphasis added.)

This is precisely the kind of "blank check" rejected in *Boulder.*[4]

Town of Hallie demonstrates the flaw in appellees' argument. There, the City of Eau Claire refused to extend sewage treatment services to areas unless they agreed to become annexed by the City. This Court found that the alleged anticompetitive conduct was exempt because Wisconsin statutes expressly authorized cities to construct sewage systems and clearly stated that the cities had no obligation to provide services to unincorporated areas. 53 U.S.L.W. at 4420. In

[4] There, this Court said: "But plainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as 'comprehended with the powers *granted,*' since the term, 'granted,' necessarily implies an affirmative addressing of the subject by the State . . . [455 U.S. at 55-56 (emphasis in original, footnote omitted).]"

short, the Wisconsin statutes expressly and specifically authorized the precise municipal conduct challenged in that antitrust suit. Contrasting the Wisconsin statute to the Colorado Home Rule Amendment in Boulder, this Court stated:

> [T]he State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that forseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was.

Id. at 4421 (footnote omitted).

The state statutes relied upon by appellees herein, unlike the Wisconsin statute, do not authorize appellees to engage in the activity specifically challenged here (*i.e.*, rent control). Contrary to appellees' claim, "contemplation" is *not* an *alternative* to clear articulation and affirmative expression of a state policy to impose regulation; it simply provides that *if* the challenged activity (*e.g.*, the right to restrict sewage service areas as in *Town of Hallie)* is authorized and clearly articulated, a reasonably foreseeable anticompetitive effect was contemplated as a part of that policy. Mere legislative awareness that a restraint is being engaged in and a legislative declaration of neutrality as to that restraint plainly does not constitute a declaration of state policy to impose those types of restraints nor an "affirmative addressing of the subject by the state." *Boulder,* 455 U.S. at 55-56.

Finally, it must be noted that *Lafayette* and *Town of Hallie* challenged anticompetitive conduct perpetrated by the municipality itself. This Court ruled in *Town of Hallie* that, under such circumstances, no active supervision by the state was necessary to find state action exemption. The instant case, however, like *Midcal,* involves a situation where the anticompetitive regulation is directed to private parties; in such circumstances active state supervision is plainly required.[5]

[5] *Town of Hallie,* 53 U.S.L.W. at 4421, n. 10. Appellees do not even mention this active state supervision requirement.

IV. PLENARY REVIEW IS NECESSARY TO AVOID CONFUSION IN THE LOWER COURTS

Even appellees admit that this case poses "important antitrust issues." Motion at 5. Yet, in this Court, appellees argue that the record below was "sparse" and that the "thorny" issues presented should be given more time to "percolate" in the lower courts. Motion at 7-8. But in the California Supreme Court, appellees urged the court to decide the antitrust issues because they were of great public importance.[6] The only explanation for this change of heart is that appellees are legitimately concerned that the opinion below so plainly flaunts controlling precedent of this Court that it will be reversed upon plenary review. Appellees' spurious "percolation" argument ignores the exhaustive scholarly, judicial and legislative commentary that has occurred since *Boulder.* Indeed, the framework to resolve the issues presented herein has already been established by this Court in *Midcal, Lafayette, Boulder* and *Town of Hallie.*

Finally appellees argue that summary disposition, although binding precedent of this Court, would be "opaque indeed" and thus not followed as *stare decisis* by the lower courts. Motion at 18. The thrust of this strange argument is that summary adjudication is desireable because no other court will be able to discern the reason for this Court's decision. The obvious lack of merit of this argument speaks for itself.

V. THE CONFISCATION ISSUES ARE SUBSTANTIAL

Whether appellees may deprive a landowner of the appreciated value of his or her property is a substantial federal question.[7] Appellees and the court below erroneously rely on zoning cases to support their conclusion that such confiscation is permitted; yet those cases involve only the "taking" of a future expectancy and not, as here, an existing property right. This

[6] This is memorialized in the opinion below:

> Defendants [appellees] likewise request that we address and resolve plaintiffs' antitrust contentions. Because of the extreme importance of the issues presented, we proceed to analyze plaintiffs' antitrust claims.

Fisher v. City of Berkeley, 37 Cal.3d at 654, 693 P.2d at 271 (footnote omitted); J. S. App. A at A-5.

[7] The complaint alleges that the Ordinance confiscated the value appellants' properties had gained over the years. See Appendix 1 to Motion, ¶¶ 16-22.

crucial distinction was illustrated by *Penn. Central Transp. Co. v. New York City,* 438 U.S. 104 (1978) which stated that a taking is not established "[s]imply by showing that [plaintiffs] have been denied the ability to exploit a property interest *that they heretofore had believed was available for development . . .*" (Emphasis added.) The "unfulfilled expectancy" rationale for zoning cases does not apply to the case at bench, where the lower court authorized the taking of an existing property interest.

The failure to provide landowners any reasonably efficient means to obtain rent adjustments to offset the inevitable effect of inflation is, as found by a unanimous court of appeals below, an entirely independent basis for declaring the Ordinance unconstitutional.[8] In a city where there are 23,000 rental units, all of which are affected by inflation, it is patently unreasonable and inevitably confiscatory to require property owners to engage repeatedly in separate administrative hearings, pay substantial filing fees and prove by a preponderance of the evidence that inflation has eroded their frozen rental income. The cumulative effect of the Ordinance is to confiscate all but the property owners historic cash investment, freeze rents and allow future increases to offset the inevitable effects of inflation only after a evidentiary hearing at which the owner has the burden of proof. The confiscatory effects are obvious.[9]

The motion to dismiss should be denied.

DATED: May 8, 1985 Respectfully submitted,

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[8] Appellees' only answer is that such decisions must be made within 120 days. Motion at 21. Even this is not true; the Ordinance authorizes unlimited extensions "for good cause." Ordinance § 12(b)(12); J. S. App. at A-128. (In truth most decisions take hundreds of days.)

[9] "Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them . . ." *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591; 70 L.Ed 747, 749; 46 S.Ct. 408 (1926).

Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1538 (16)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, an individual;
MARGUERITE JACOBS, an individual;
MORT BAKER, an individual;
RICHARD LAWHORN, an individual;
ANTHONY KERSHAW, an individual;
and LEVIN-ZEMEL, INC., a corporation,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation;
THE BERKELEY CITY COUNCIL; THE BERKELEY RENT
STABILIZATION BOARD; DOES I through XX, inclusive,

Appellees.

On Appeal from the Supreme Court of the State of California

JOINT APPENDIX

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178

TABLE OF CONTENTS

PAGE

Appendix A—

Complaint for Preliminary and Permanent Injunctions; Declaratory Relief A-1

Appendix B—

Answer A-12

APPENDIX A

FILED
AUG 19 1980
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ALAMEDA

ALEXANDRA FISHER, an individual; MARGUERITE JACOBS, an individual; MORT BAKER, an individual; RICHARD LAWHORN, an individual; ANTHONY KERSHAW, an individual and LEVIN-ZEMEL, a corporation; on behalf of themselves and all others similarly situated;

Plaintiffs,

v.

THE CITY OF BERKELEY, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY RENT STABILIZATION BOARD; DOES I through XX, inclusive,

Defendants.

No. 536602-6

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIONS; DECLARATORY RELIEF

FIRST CAUSE OF ACTION

(Declaratory Relief)

1. Plaintiffs RICHARD LAWHORN, MORT BAKER, ALEXANDRA FISHER, and MARGUERITE JACOBS are, and at all times relevant have been, residents and voters of the City of Berkeley, and the owners of apartment buildings located within that City and rented for residential purposes.

2. Plaintiff ANTHONY KERSHAW is and at all times relevant has been an owner of rental units in the City of Berkeley which are rented for residential purposes. Plaintiff LEVIN-ZEMEL is and at all times relevant has been a California corporation and the owner of an apartment building located in the City of Berkeley and rented for residential purposes.

3. At all times relevant, including within the past year, plaintiffs and each of them have paid taxes in and to the City of Berkeley.

4. Defendant City of Berkeley is a municipal corporation, a public entity and a Charter City, existing under the Constitution and laws of the State of California, located in the County of Alameda.

5. Defendant Berkeley City Council is composed of officers and agents of the City of Berkeley.

6. Defendant Berkeley Rent Stabilization Board is a board of Berkeley citizens created by and pursuant to the adoption of Measure D on the Berkeley municipal ballot for the June 3, 1980 election and appointed by the Berkeley City Council.

7. Plaintiffs lack information and belief as to the true names and capacities of defendants Does I through XX, and for that reason sue said defendants by said fictitious names. When their true names and capacities are ascertained, plaintiffs will amend this complaint by inserting their true names and capacities herein.

8. On November 7, 1978, the electorate of the City of Berkeley passed a Renter Property Tax Relief Ordinance.

9. On November 27, 1979, the Berkeley City Council passed an ordinance establishing a Temporary Rent Stabilization Program, effective until June 30, 1980.

10. On June 3, 1980, a majority (but less than ⅔) of voters in the City of Berkeley authorized to vote thereon and who voted, voted in favor of Measure D on the municipal ballot and thereby adopted an ordinance entitled "Adopting A Rent Stabilization And Eviction for Good Cause Program", a true and correct copy of which is attached hereto as Exhibit A incorporated herein by this reference. Said ordinance is hereinafter referred to as the "Ordinance." As a consequence, the Ordinance of its own terms, and without more, has become and is the subject of enforcement as law in the City of Berkeley and various acts and events have occurred and will occur including without limitation the following:

a. Within 30 days of adoption of the Ordinance, members of the Berkeley City Council appointed a Rent Stabilization Board ("the Board") to exercise certain powers and duties as set forth in the Ordinance.

b. The Ordinance and Board require that all landlords file with the Board by September 1, 1980 a rent registration statement for each rental unit covered by the Ordinance. The Board has formulated and issued detailed registration forms which the Ordinance requires owners to completely fill in and file with the Board no later than September 1, 1980.

c. A registration fee of twelve dollars ($12.00) per rental unit must be paid by the Owner to the Board no later than September 1, 1980.

d. Failure to file the registration statement and registration fee will result in imposition of an additional $12.00 penalty charge for each rental unit not registered.

e. After adoption of the Ordinance, it is unlawful to charge rent on a regulated rental unit in an amount greater than the lawful rent due and payable on May 31, 1980 in

accordance with the provisions of the Temporary Rent Stabilization Program unless the Board sets a different rent in accordance with sections 11 and 12 of the Ordinance.

f. The Board may grant annual citywide rent increases or decreases based upon changes in costs of utilities, property taxes, and maintenance and operating expenses.

g. The intent of the Ordinance is to restrict the Board to grant rent increases only when the landlord demonstrates it is necessary to provide a landlord with a fair return on investment.

h. Special defenses, conditions precedent, causes of action and burdens of proof will be applicable to unlawful detainer actions, notwithstanding any existing state law or pre-existing agreements of the contracting parties to the contrary.

11. The Ordinance both on its face and in its application violates the Constitutions and laws of the United States and of the State of California. More particularly, the Ordinance:

a. Constitutes a taking of property for public use without just compensation and due process in contravention of the Fourteenth Amendment of the United States Constitution and Article I, section 19 of the California Constitution.

b. Constitutes a violation of the right to due process of law in contravention of the Fourteenth Amendment of the United States Constitution and Article I, section 7 of the California Constitution.

c. Constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution and Article I, section 7 and Article IV, section 16 of the California Constitution.

d. Constitutes a violation of the right of privacy of personal affairs in contravention of the Fourth Amendment of the United States Constitution, and Article I, section 1 of the California Constitution.

e. Constitutes an impairment of the obligation of contracts in contravention of Article I, section 10 of the United States Constitution and Article I, section 9 of the California Constitution.

f. Constitutes an attempt to regulate an area preempted by legislation of the State of California.

g. Constitutes an illegal restraint on alienation of real property in violation of legislation and public policy of the State of California.

h. Imposes a tax on the owners of residential rental property in the City of Berkeley in violation of Article XIIIA of the California Constitution.

12. An actual controversy has arisen and now exists between plaintiffs and defendants, and each of them, concerning their respective rights, duties and obligations under and arising out of the Ordinance. Plaintiffs contend that the Ordinance is unconstitutional, unlawful, and invalid on its face and in its operation and are informed and believe and thereupon allege that defendants, and each of them, dispute such contention and contend that the Ordinance is valid and enforceable in all respects.

13. Plaintiffs desire a judicial determination of the validity and enforceability of the Ordinance and the rights, duties and obligations of the parties with respect thereto.

14. Such a declaration is necessary and appropriate at this time in order that plaintiffs may ascertain their rights, duties and obligations under the Ordinance, to avoid great and irreparable injury to the parties, and to avoid a multiplicity of litigation with respect to the validity, enforceability, and meaning and effect of the Ordinance.

SECOND CAUSE OF ACTION

(For Injunction Against Enforcement)

15. Paragraphs 1 through 13, inclusive, of plaintiffs' First Cause of Action are incorporated herein by this reference.

16. Each of the plaintiffs herein currently leases rental units governed by the Ordinance.

17. The costs of operation of the rental units in Berkeley owned and leased by plaintiff RICHARD LAWHORN are now in excess of the rental income from those units and the "negative cash flow" to plaintiff LAWHORN is three hundred fifty dollars a month. When said units were acquired in 1977 the prevailing rents were such to permit plaintiff LAWHORN to "break even." Current restricted rent levels jeopardize the ability of said plaintiff to make payments on his mortgage loans and not to default on said payments.

18. Plaintiff ALEXANDRA FISHER purchased after January 1, 1980, a building in Berkeley which contains four (4) rental units, one of which she occupies. Plaintiff FISHER is unable with the current restricted rents to "break even" on her property payments and has a "negative cash flow" on said property. Plaintiff FISHER owns no other real property.

19. Plaintiff MARGUERITE JACOBS owns a five (5) unit building in Berkeley which she and her late husband had constructed in 1961 and prior to enactment of the Ordinance in her opinion and that of an appraiser had a fair market value of approximately $150,000. Said building in her opinion and that of an appraiser currently has an estimated fair market value of $117,000 as a result of the Ordinance.

20 Plaintiff LEVIN-ZEMEL, INC. owns a building in Berkeley which said plaintiff's predecessor had constructed in the 1960's and with respect to which said plaintiff's equity is substantial when compared to a relatively small cash investment.

21. Plaintiff ANTHONY KERSHAW owns buildings in Berkeley which he purchased numerous years ago and has greatly increased the value of through thousands of hours of his own labor and improvements he has made thereon.

22. Absent the relief sought hereby:

a. No rent may be increased except by order of the Rent Control Board.

b. Plaintiffs and others similarly situated who desire to sell their rental units will be forced to sell said units at values greatly below the fair market value of said units prior to enactment of the Ordinance.

c. Many plaintiffs and others similarly situated who are in a "negative cash flow" position will not be able raise their rents sufficiently to reach a "break even" position.

d. From and after the adoption of the Ordinance plaintiffs are precluded from seeking or obtaining recovery of possession of their rental units except on the terms specified by section 13 and 14 of the Ordinance and will be subject to the terms of section 15 of the Ordinance.

23. As a consequence of the foregoing, the Ordinance is unconstitutional and its enforcement will cause great and irreparable injury to the plaintiffs. and each of them for the following reasons:

The rent freeze and restrictive future rent increases will result in a loss of income and revenues for plaintiffs and each of them. Such loss cannot, pursuant to the Ordinance be recouped through future increased rentals. The Ordinance mandates that all future rents be set by the Rent Board, which Board has no power to direct that tenants who had benefitted from frozen rents or rollback rents subsequently remit to the landlord the difference between such rents and the proper adjusted rent subsequently set by the Board. Nor does the Board have the power to subsequently set future rents at a rate which will recoup the lost rental for prior periods and/or from prior

tenants nor to remit such amounts from its or the City's funds to injured lessors. The amount of such unrecoverable loss is undeterminable for the reason that the Rent Board need not conduct hearings or set rents until October 31, 1980 and December 31, 1980 respectively. Yet the freeze and other provisions will absent the relief here sought, be in effect at all times from and after the adoption of the Ordinance. In consequence, enforcement of the freeze and rent setting provisions of the Ordinance will constitute a violation of the constitutional guarantees herein enumerated.

THIRD CAUSE OF ACTION

(Injunction Against Waste of Funds)

24. Paragraphs 1 through 13, inclusive, of plaintiffs' First Cause of Action are incorporated herein by this reference.

25. The appointment of Board Members, as well as other actions and events more specifically set forth in the Ordinance, will from the date of adoption and thereafter require the expenditure of funds, time, and effort by the City of Berkeley.

26. In consequence of the foregoing, the individual defendants will, in the absence of the relief here sought, be required and obliged to expend and to authorize the expenditure of funds and property of the City of Berkeley in compliance with the Ordinance.

27. Such expenditures will be illegal and will constitute a waste of public monies for the reason that the Ordinance violates the Constitutions and laws of the United States and of the State of California as more particularly set forth in the First Cause of Action in this Complaint.

FOURTH CAUSE OF ACTION

(Injunction Against Violation of California Environmental Quality Act)

28. Paragraphs 1 through 27, inclusive of the Complaint are incorporated herein by this reference.

29. The California Environmental Quality Act (Public Resources Code section 21001, et seq.) requires that an environmental impact report must be prepared and filed prior to the direct undertaking of activities by a public agency, unless the activity is exempt by law.

30. The activities to be undertaken by the Berkeley Rent Stabilization Board pursuant to the Ordinance are not exempt from the requirements of the California Environmental Quality Act.

31. By failing and refusing to prepare and file an environmental impact report with respect to its activities under the Ordinance, the Berkeley Rent Stabilization Board is in violation of the California Environmental Quality Act and the Board's activities in administering the Ordinance must be enjoined.

WHEREFORE, plaintiffs pray:

1. For a declaration that the Ordinance is unconstitutional, invalid, and unenforceable, on its face and/or in its operative effect, and that none of the parties hereto have any right, duty or obligation to comply with the terms or provisions thereof.

2. For a preliminary injunction enjoining defendants, and each of them, and all those acting by, through, for, on behalf of, in concert with them, or pursuant to any of the provisions of the Ordinance, during the pendency of this action, from authorizing or engaging in, directly or indirectly, the enforcement of the Ordinance in its entirety and/or any of the following provisions of the Ordinance: Sections 4(f), 11, 12(c), and (i), 14 and 15.

3. For a permanent injunction enjoining defendants, and each of them, and all those acting by, through, for, on behalf of, in concert with them, or pursuant to any of the provisions of the Ordinance, from authorizing or engaging in, directly or indirectly, the enforcement of the Ordinance in its entirety and/or any of the following provisions of the Ordinance: Sections 4(f), 8, 11, 12, 13, 14 and 15.

4. For a preliminary injunction enjoining the defendants and each of them and all those acting by, through, for, on behalf of, or in concert with them, during the pendency of this action, from authorizing, engaging in or performing, directly or indirectly, the expenditure of funds of the City of Berkeley to enforce, attempt to enforce, or comply with, each, any and/or all of the provisions of the Ordinance, and particularly, sections 4(f), 11, 12(c) and (i), 14 and 15.

5. For a permanent injunction enjoining the defendants and each of them and all those acting by, through, for, on behalf of, or in concert with them, from authorizing, engaging in or performing, directly or indirectly, the expenditure of funds of the City of Berkeley to enforce, attempt to enforce, or comply with, each, any and/or all of the provisions of the Ordinance.

6. For costs of suit, including reasonable attorneys' fees.

7. For such other and further relief as the court deems just.

Dated:

DOBBS & NIELSEN

By_____
JAMES R. PARRINELLO, Esq.,
Attorneys for Plaintiffs

VERIFICATION

I, ALEXANDRA FISHER, am a plaintiff in this action.

I have read the foregoing Complaint and know the contents thereof. The same is true of my own knowledge, except to those matters which are thereon stated on information and belief, and, as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration is executed on August 18, 1980, in Berkeley, California.

_____
ALEXANDRA FISHER

APPENDIX B

FILED
SEP 15 1980
RENE C. DAVIDSON,
County Clerk
By _____
Delane Williams,
Deputy

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

ALEXANDRA FISHER, et al.,
Plaintiffs,

vs

CITY OF BERKELEY, et al.,
Defendants.

No. 536602-6

ANSWER

Defendants answer the complaint as follows:

1. Defendants lack sufficient information or belief to answer paragraphs one through three and therefore deny the allegations of those paragraphs.

2. Defendants admit the allegations of paragraphs 4 through 9.

3. In answer to paragraph 10, Defendants admit that on June 3, 1980, the electorate of Berkeley enacted Measure D, a copy of which is attached to the complaint as Exhibit A, and which speaks for itself.

4. Defendants deny the allegations of paragraph 11.

5. In answer to the allegations of paragraph 12, Defendants deny that an actual controversy has arisen or exists between Plaintiffs and Defendants.

6. Defendants admit the allegations of paragraph 13.

7. Defendants deny the allegations of paragraph 14.

8. In answer to the allegations of paragraph 15, Defendants incorporate herein paragraphs 1 through 6 above.

9. Defendants lack sufficient information of belief to answer paragraphs 16 through 22, and therefore deny the allegations of those paragraphs.

10. Defendants deny the allegations of paragraph 23.

11. In answer to the allegations of paragraph 24, Defendants incorporate herein paragraphs 1 through 6 above.

12. Defendants admit the allegations of paragraphs 25 and 26.

13. Defendants deny the allegations of paragraph 27.

14. In answer to paragraph 28, Defendants incorporate herein the allegations of paragraphs 1 through 13 above.

15. Defendants admit the allegations of paragraph 29.

16. Defendants deny the allegations of paragraphs 30 and 31.

WHEREFORE, Defendants pray for judgment as follows:

1. For a declaration that Measure D is valid and enforceable;

2. Denying further relief to Plaintiffs;

3. For costs of this suit; and

4. For such other relief as the court deems proper.

DATE: September 12, 1980

MYRON MOSKOVITZ
ANN JUERGENS
Attorneys for Defendants

Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL, and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Is a local ordinance which establishes ceilings on the price which property owners may charge for rental housing unconstitutional under the supremacy clause because it is in conflict with and thus preempted by the Sherman Act?

(a) Does the California Supreme Court's creation of a "public welfare" defense erroneously permit municipalities to give prevailing weight to their local concerns in defiance of specific congressional antitrust enactments which mandate a national pro-competition policy?

(b) May a municipality mandate landowners to fix rental rates in the absence of any clearly articulated and affirmatively expressed state policy and any active state supervision of the anticompetitive local program?

(c) Does the decision below fail to follow this Court's rulings which recognize that governmentally imposed vertical price maintenance is a per se violation of the Sherman Act and is thus unconstitutional under the supremacy clause?

d) Is a local rent control ordinance protected from preemption by existing state legislation which is, at best, neutral on the subject of rent control?[1]

PARTIES TO THIS APPEAL

Appellants Alexandra Fisher, Marguerite Jacobs, Mort Baker, Richard Lawhorn, and Anthony Kershaw, all individual rental property owners, and Levin-Zemel, a California corporation, were plaintiffs and appellants in the courts below.

Appellees City of Berkeley, California, a municipal corporation, the Berkeley City Council and the Berkeley Rent Stabilization Board, were defendants and appellees in the courts below. There were no other parties.

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[1] The jurisdictional statement also presented a due process question which was not accepted for consideration.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THIS APPEAL	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL BASIS	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THE BERKELEY RENT CONTROL ORDINANCE IS NON-IMMUNE LOCAL GOVERNMENTAL ACTION WHICH CONFLICTS WITH FEDERAL ANTITRUST LAWS AND POLICIES	11
II. THE BERKELEY RENT CONTROL ORDINANCE IS PREEMPTED BY SECTION 1 OF THE SHERMAN ACT	17
A. The Berkeley Ordinance Mandates The Fixing And Stabilizing Of Rental Prices And Is Illegal Per Se Under Section 1 Of The Sherman Act	21
B. Berkeley's Control Of Rental Prices Has Widespread And Far-Reaching Anticompetitive Impacts	24
C. The Berkeley Rent Control Program Adversely Affects Interstate Commerce	27
III. THE BERKELEY RENT CONTROL ORDINANCE IS NOT IMMUNE FROM FEDERAL ANTITRUST STATUTES IN THAT IT WAS NOT ENACTED PURSUANT TO A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY	30
A. California Has No Clearly Articulated And Affirmatively Expressed Policy Regarding Rent Control	30

	Page
B. The California Legislation Relied Upon Below By Appellees Does Not Clearly Articulate Or Affirmatively Express A State Policy Authorizing Berkeley's Rent Control Ordinance	33
IV. THERE IS NO STATE SUPERVISION OF THE BERKELEY RENT CONTROL PROGRAM	36
V. THE COURT BELOW ERRED IN CREATING A "PUBLIC WELFARE" DEFENSE TO A LOCAL GOVERNMENT'S VIOLATION OF FEDERAL ANTITRUST LAWS AND POLICIES	37
CONCLUSION	42

TABLE OF AUTHORITIES

CASES	PAGE(S)
Albrecht v. Herald Co., 390 U.S. 145 (1968)	22
Arizona v. Maricopa County Med. Soc'y., 457 U.S. 332 (1982)	9, 22, 23
Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976)	5, 30
Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979)	23, 24
Burke v. Ford, 389 U.S. 320 (1967)	28
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	9, 11, 12, 13, 19, 20, 22, 36
Chambers v. Mississippi, 410 U.S. 284 (1973)	8
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	10, 11, 12, 13, 14, 19, 23, 25, 30, 31
Coates v. City of Cincinnati, 402 U.S. 611 (1971)	3
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	10, 11, 12, 13, 23, 30, 34
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)	20
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	22
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Fisher v. City of Berkeley, 37 Cal.3d 644, 693 P.2d 261, 209 Cal.Rptr. 682 (1984)	1, 13, 16, 17, 23, 25, 30, 39, 40
Fisher v. City of Berkeley, 148 Cal.App.3d 267, 197 Cal.Rptr. 836 (1983)	2
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	9, 11, 28
Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979)	12
Hines v. Davidowitz, 312 U.S. 52 (1941)	18, 27, 40
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	18, 40
Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 60 (1966)	20
King Mfg. Co. v. City Council of Augusta, 277 U.S. 100 (1928)	3

CASES	PAGE(S)
Mandeville Island Farm, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948)	28
McLain v. Real Estate Board of New Orleans, 444 U.S. 232 (1980)	28
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)	39
Nash v. Florida Industrial Comm'n., 389 U.S. 235 (1967)	18, 40
National Gerimedical Hospital v. Blue Cross of Kansas City, 452 U.S. 378 (1981)	12
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)	8, 21, 23, 24
New Motor Veh. Bd. of California v. Orrin W. Fox Co., 439 U.S. 96 (1978)	9, 33
Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958)	25
Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971)	8
Orr v. Orr, 440 U.S. 268 (1979)	8
Parker v. Brown, 317 U.S. 341 (1943)	9, 12, 19, 41
Perez v. United States, 402 U.S. 146 (1971)	28
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	39
Raley v. Ohio, 360 U.S. 423 (1959)	8
Rice v. Norman Williams Co., 458 U.S. 654 (1982)	9, 19, 20, 24
Russell v. United States, 53 U.S.L.W. 4652 (June 3, 1985)	29
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 145 (1968)	9, 19, 22
Southern Motor Carriers Rate Conference, Inc. v. United States, 53 U.S.L.W. 4423 (March 27, 1985)	12, 13, 31, 32,37
Town of Hallie v. City of Eau Claire, 53 U.S.L.W. 4418 (March 27, 1985)	9, 12, 13, 30, 31, 37
Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 (9th Cir. 1982), cert. denied 456 U.S. 1011 (1982)	28
United States v. Container Corp. of America, 393 U.S. 333 (1969)	21
United States v. Frankfort Distilleries, 324 U.S. 293 (1945)	28

CASES	PAGE(S)
United States v. Parke, Davis & Co., 362 U.S. 29 (1960)	22
United States v. Philadelphia National Bank, 374 U.S. 321 (1963)	12
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United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944)	28
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	12
Ward v. Village of Monroeville, 409 U.S. 57 (1972)	8
Wickard v. Filburn, 317 U.S. 111 (1941)	28

STATUTES AND ORDINANCES:

15 U.S.C.	§ 1	3, 8, 11
	§ 15	17
	§ 35	3, 15
28 U.S.C.	§ 1257(2)	2, 3
CAL. GOV'T CODE	§ 65589 (Deering)	3, 34
CAL. HEALTH & SAFETY CODE	§ 1518 (Deering)	4
	§ 50202 (Deering)	4, 34, 36
	§ 51852.5 (Deering)	4
ME. REV. STAT. tit. 30, ch. 244		41
MASS. GEN. LAWS ANN. ch. 797, §§ 1 et seq. and ch. 842, §§ 1-14 (West)		41
N.J. STAT. ANN. §§ 2A, 42-74 and 42-77 (West)		41
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H.R. 98-965, 98th Cong. 2d Sess. (1984)		15
H.R. 5992, § 3, 98th Cong. 2d Sess. (1984)		15

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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL, and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' BRIEF

Appellants Alexandra Fisher, Marguerite Jacobs, Mort Baker, Richard Lawhorn, Anthony Kershaw and Levin-Zemel, Inc. hereby submit their brief supporting their appeal.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 37 Cal.3d 644, 693 P.2d 261, 209 Cal.Rptr. 682 (1984). The opinion appears as Appendix A in the Jurisdictional Statement Appendix ("J.S. App. A").

The opinion of the California Court of Appeal was reported (until vacated) at 148 Cal.App.3d 267, 195 Cal.Rptr. 836 (1983). The opinion appears as J.S. App. B.

JURISDICTIONAL BASIS

a. Appellants filed suit for declaratory and injunctive relief in the Superior Court in and for the County of Alameda, State of California. The complaint sought, *inter alia*, a declaratory judgment that the Berkeley Rent Stabilization And Eviction For Good Cause Ordinance, Berkeley, California Ordinance 5261-N.S. (June 3, 1980) ("the Ordinance")[2] violated the Federal Constitution and an injunction against its enforcement. After initially enjoining enforcement of portions of the Ordinance, the superior court granted appellees' motion for judgment on the pleadings, declaring that the Ordinance was valid in all respects and ordering appellants to obey its mandates.[3] The California Court of Appeal, First Appellate District, Division Five, unanimously reversed the superior court and declared that the Ordinance was unconstitutional. After granting hearing, the California Supreme Court, in a 6 to 1 decision, reversed the court of appeal and sustained the validity of the Ordinance against appellants' constitutional attack.[4]

b. The judgment of the California Supreme Court was rendered on December 27, 1984. Appellants filed a timely notice of appeal in the California Supreme Court on March 18, 1985.[5]

c. Jurisdiction of this appeal lies in 28 U.S.C. § 1257(2), which provides for an appeal from a final judgment of a state's

[2] The Ordinance was amended in part in 1982 when Berkeley voters enacted the Tenants Rights Amendments Act of 1982 which is currently in effect. All references to the Ordinance are to the amended version which appears as J.S. App. G. Unless otherwise indicated, all references to "sections" are to sections of the Ordinance.

[3] The temporary restraining order, preliminary injunction and judgment on the pleadings appear as J.S. App. C, D and E, respectively.

[4] Two supreme court justices did not participate in the decision and were replaced by Los Angeles Superior Court judges who were assigned by the Chief Justice; the *pro tem* justices voted with the majority.

[5] A copy of the notice of appeal appears as J.S. App. F.

highest court "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." Section 1257(2) applies where a municipal ordinance has been declared constitutional by a state's highest court. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n. 3 (1975); *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100 (1928); *Coates v. City of Cincinnati*, 402 U.S. 611, 612 (1971). This Court noted probable jurisdiction on May 28, 1985.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant Constitutional provisions are:

> Article VI, clause 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant statutory provisions are:

15 U.S.C. § 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C. § 35(a): No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

Cal. Gov't Code § 65589 (Deering). Construction: (b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

(c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to

be undertaken to implement the housing elements of the local general plan.

Cal. Health & Safety Code § 1518 (Deering). Rent Controls: (a) Nothing in this chapter shall authorize the imposition of rent regulations or controls for licensed community care facilities.

(b) Licensed community care facilities shall not be subject to controls on rent imposed by any state or local agency or other local government or entity.

Cal. Health & Safety Code § 50202 (Deering). Authority to Impose Rent Regulations or Controls: Nothing in this division shall authorize the imposition of rent regulations or controls except by a regulatory contract between the agency or the department, as the case may be, and its housing sponsor or developer, for housing units financed, insured, coinsured or otherwise assisted by the agency or by the department, as the case may be. Except for the federal government, the right to control rent on such units shall reside exclusively in the agency or the department, as the case may be, and the housing sponsor or developer so regulated shall not otherwise be subject to controls on rent imposed by any state or local agency or other local public entity.

Cal. Health & Safety Code § 51852.5 (Deering). Exemptions for Rental Housing Developments: Notwithstanding any other provision of law:

(a) Any rental housing development which is financed from mortgages insured pursuant to this chapter shall be exempt from all of the following: . . .

(2) Any rent control except for units made available to lower income households as provided pursuant to subdivision (a) of Section 51226 and subdivision (k) of Section 51852.

STATEMENT OF THE CASE

Appellants are small owners and operators of residential rental property within the City of Berkeley, California.[6] Berkeley is the site of a major university with a sizeable student population and tenants greatly outnumber rental property owners. *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129 at 145-6, n. 14, 550 P.2d at 1010, 130 Cal.Rptr. at 474 (1976).

The history of rent control in Berkeley began with federal price controls during the Nixon Administration. As those controls were phased out, the tenant-dominated populace decided to impose its own brand of rent control.[7] To this end, a stringent rent control initiative was placed on the June 6, 1972 city election ballot and enacted by majority vote. Enforcement of that particular rent control law was enjoined by the superior court and, in 1976, declared unconstitutional by the California Supreme Court on due process grounds. *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

The rent control movement was deterred only momentarily. Another rent control initiative was placed on the April 1977 Berkeley city ballot but was rejected by the voters after a bitter campaign.[8] However, in June 1978 the citizens of California enacted Proposition 13 which mandated real property tax reductions and spurred rent control enthusiasts to place another initiative, Measure I, on the very next ballot. On November 7, 1978, the Berkeley electorate passed Measure I, the Rental Property Tax Relief Ordinance. This law froze rents at their June 1978 levels and required landowners to pass on to their tenants 80% of their Proposition 13 tax savings by reducing rents for calendar year 1979.

---

[6] During the fourth year of the litigation below, Appellant Alexandra Fisher declared bankruptcy and lost her four-unit building (in which she resided) to foreclosure. U.S. Dist.Ct. (N.D. Cal.) B.R. No. 484-01827 PW.

[7] Berkeley rent control theory can be traced to a document entitled "The City's Wealth, Programs for Economic Control in Berkeley" which described rent control as "community expropriation in favor of the tenants." (p. 21.) This document was authored by the Community Ownership Organizing Project and published by the Institute For Policy Studies, Wasington, D.C. in 1976.

[8] That initiative campaign resulted in a decision of this Court affirming campaign contributors' associational and speech righ . *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290 (1981).

As Measure I was about to expire, the Berkeley City Council on November 27, 1979, enacted Ordinance 5212 entitled the Temporary Rent Stabilization Program; this law continued the rent freeze and permitted landowners to increase rents a maximum of 5% only if they demonstrated in writing (for tenant review) that such an increase was necessary to offset actual operating cost increases. Ordinance 5212 was an interim measure to control the price of rental housing during the period between the expiration of Measure I on December 31, 1979 and the June 3, 1980 city election. Section 10, J.S. App. G at A-122; copies of Measure I and Ordinance 5212 have been lodged with the Clerk of the Court simultaneously with the filing of this brief.

At the June 3, 1980 city election, the Berkeley electorate passed Measure D which is the Ordinance at issue here. Despite the raging inflation of the late 1970s, the Ordinance continued the price controls that had been in effect since June of 1978 and prohibited appellants and other landowners from raising rents without the express permission of the appellee Rent Stabilization Board ("the Board"). Violators of the price ceiling are subject to criminal prosecution. Section 19, J.S. App. G at A-139.

The Board is empowered under the Ordinance to authorize rent increases in just two circumstances: discretionary annual general adjustments and individual adjustments pursuant to an individual petition and administrative hearing process. Section 11, which governs annual general adjustments, permits (but does not require) the Board to grant annual city-wide rent increases to offset certain cost increases (i.e., utility rates, property taxes and operating and maintenance costs) but prohibits increases for any other reason including to offset the erosionary impact of inflation on June 1978 rental dollars. Section 12, which governs the individual petition process, allows an adjustment of the 1979 rental ceiling only when, in a formal administrative hearing, the landowner demonstrates by a preponderance of the evidence that an increase is necessary to provide "a fair return on investment." Section 12(c), J.S. App. G at A-129. Rent increases merely to pay for the amortization of capital improvements are likewise prohibited unless authorized via this cumbersome administrative hearing process. Even

when a tenant voluntarily vacates a unit, the rent of the new tenant cannot be raised. Section 10, J.S. App. G at A-122.

There are more than 23,000 privately-owned rental units in Berkeley which are subject to the Ordinance. Each unit must be registered annually by its owner with the Board; the registration form requires submission of detailed information under penalty of perjury concerning the rent history of the unit. Section 8, J.S. App. G at A-120. Annual registration fees, which were $12 per unit in 1980, are now $30 per unit and will be increased to $60 per unit by years' end. Section 8(d), J.S. App. G at A-121.

The asphyxiating effects of this restrictive regime on competition are obvious. Owners are prevented from competing by a self-interested tenant majority which has decided that price competition is to be displaced by regulation. A corollary effect is that those seeking to locate rental housing are prevented from competing with existing tenants. The Ordinance facially deprives owners (and prospective tenants) of the ability to engage in price competition and has a devastating effect on the housing supply which ultimately leads to the abandonment and/or elimination of rental housing.[9]

The questions presented by this appeal are properly before this Court. The supremacy clause preemption issues were raised initially in the state supreme court with that court's express permission, and were the focal point of the first 54

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[9] Indeed this has already occurred in Berkeley. The city council on December 31, 1984, enacted an urgency ordinance, Ord. 5626-N.S. § 5, 1984, which requires an owner of residential rental property to obtain a removal permit before taking his or her units off the rental market by demolition, condominium conversion or similar approach. No permit may be issued if removal would adversely affect the city's housing supply or if the controlled unit is occupied or occupiable by persons of very low, low or moderate income. The enactment of this law is tantamount to an admission that price control forces owners out of the rental market and thereby diminishes supply and competition. Indeed the city council's findings specifically state:

> During the past several months the council has noted a significant increase in the number of applications for issuance of permits which would have the direct or indirect result of authorizing the removal of units from the rental housing market. Many of such projects have already received preliminary permit approvals. In order to prevent the further loss of rental housing units through conversion or

(footnote continued on following page)

pages of the slip opinion below. J.S. App. A at A-1 through A-35. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). *See also, Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n. 3 (1971); *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972); *Orr v. Orr*, 440 U.S. 268, 274-275 (1979). Jurisdiction also resides in this Court where the federal question is raised below but the state court failed to decide it. *Chambers v. Mississippi*, 410 U.S. 284, 290 n. 3 (1973).

SUMMARY OF ARGUMENT

Appellee City of Berkeley has enacted a rent control ordinance which stabilizes or fixes the price at which 23,000 private rental units in the City may be rented to the public. This Ordinance not only bans, but criminalizes free and open price competition in the private rental market; it subordinates the strong national policy in favor of price competition for the sole purpose of shifting wealth to a favored political constituency — current occupants of the city's rental housing. Few, if any, municipal programs are more hostile to the nation's antitrust policies than price-fixing.

Price competition is the most important component of federal antitrust policy, *National Society of Professional Engineers v. U.S.*, 435 U.S. 679 (1978); indeed, under Section 1 of the Sherman Act, 15 U.S.C. § 1, combinations and programs which fix or stabilize prices are ruled illegal per se without need for further examination of anticompetitive effects and without regard for any alleged public benefit or public welfare justifications for such price control. *U.S. v. Socony-Vacuum Oil Co.*, 310

(footnote continued from preceding page)

> demolition, and to protect the public welfare, it is necessary that this chapter take effect immediately.

A copy of this Ordinance has been lodged with the Clerk of the Court.

A *New York Times* article recently reported similar effects of that city's rent control law:

> The supply of rental housing in New York is being eroded from several directions at once. At the top, cooperative apartments nearly doubled between 1977 and 1983, to 271,000. At the bottom, tens of thousands of apartments have been abandoned . . .

N. Y. Times, June 4, 1985, at B 1; Matthew L. Wald.

U.S. 150 (1940); *Arizona v. Maricopa County Med. Soc'y.* 457 U.S. 332 (1982).

The California court below disregarded this Court's uniform condemnation of price-fixing and ruled that the per se standard of invalidity did not apply to a municipal rent-fixing program. The court below was patently in error. In the context of a preemption challenge (as in the case at bench), the per se illegal nature of price-fixing has been recognized as the most important criterion in finding that a non-immune government program to stabilize prices is in direct conflict with the Sherman Act and hence preempted thereby. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (hereinafter "*Midcal*"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 145 (1968) (hereinafter "*Schwegmann*"). While not all potentially anticompetitive local governmental regulations run afoul of federal antitrust laws, *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), those which fix or stabilize prices do. In the case at bench, Berkeley has made price-competition a crime; that creates a direct conflict between the Berkeley rent control ordinance and Section 1 of the Sherman Act. As such the Ordinance is preempted and unconstitutional under the supremacy clause.

Under principles of federalism, this Court has recognized that Congress did not intend for its antitrust statutes to unduly restrict the sovereign regulatory powers of the states. Standards have carefully been developed to identify circumstances under which state and local governmental action may be exempt from federal antitrust restrictions. The state action antitrust exemption meticulously balances national antitrust policy with the interests of the sovereign states in enacting certain specific regulatory programs which displace free and open competition.

States, as sovereigns, may enact such regulatory programs themselves, *Parker v. Brown*, 317 U.S. 341 (1943); *New Motor Veh. Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), or they may specifically authorize municipalities to pursue such programs. *Town of Hallie v. City of Eau Claire*, 53 U.S.L.W. 4418 (March 27, 1985) (hereinafter "*Town of Hallie*"). Thus,

if rental price stabilization is viewed by the California legislature as being important to the public interest and welfare, it could, itself, enact a regulatory scheme which replaces market competition with regulation. Similarly, the legislature could "clearly articulate and affirmatively express" a state policy authorizing rent control by municipalities.

However, it is clear that the California legislature has not adopted a state policy authorizing rent control in any form. There is no direction whatsoever by the sovereign to replace price-competition with a regulatory regime governing the private rental unit market.

This Court has been clear in consistently ruling that without such a state sovereign policy decision, municipalities may not, on their own, disregard federal antitrust laws and policies. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (hereinafter "*Lafayette*"); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (hereinafter "*Boulder*"). Indeed, under such circumstances, municipalities must abide by federal antitrust laws. There are tens of thousands of local governmental units nationwide. It would create an intolerable interference with national antitrust policy if each of these governmental entities were empowered to enact anticompetitive ordinances to pursue some real or imagined temporary local interest. The proper forum for protecting and promoting such local interests is the state Legislatures which are able to utilize their sovereign power to implement regulatory programs of statewide applicability and provide adequate safeguards against anticompetitive abuses which are unnecessary to the accomplishment of the sovereign's regulatory purposes.

The ruling of the California court below erroneously creates a new "public welfare defense" for municipalities' violations of antitrust law and policy. Under the law of preemption, it is unheard of for a local government to urge the importance of its parochial interest as a defense to supervening federal statutory policy. The California court also ruled that price-fixing by a municipality was not a per se violation of the Sherman Act. This was clearly erroneous in light of *Midcal* where this Court ruled that non-immune state price stabilization

programs were per se violations, hence in direct conflict with Section 1 of the Sherman Act.

In the context of our case, the California Supreme Court's refusal to apply the per se rule to municipal price-fixing has the effect of creating antitrust immunity for cities. It allows cities, acting with no direction (much less, authorization) from the state, to fix prices with resultant impacts on the market far more crippling to national antitrust policy than the situations presented to this Court in *Midcal, Lafayette* or *Boulder*.

Viewed from any perspective, it must be recognized that the Berkeley Ordinance stabilizing prices on 23,000 private rental units is in direct conflict with and preempted by Section 1 of the Sherman Act and must be held unconstitutional under the supremacy clause.

ARGUMENT

I. THE BERKELEY RENT CONTROL ORDINANCE IS NON-IMMUNE LOCAL GOVERNMENTAL ACTION WHICH CONFLICTS WITH FEDERAL ANTITRUST LAWS AND POLICIES

Appellants here challenge the legality of a municipality's enactment of an ordinance which fixes the prices at which private property owners may rent or lease their property. This Court has been clear in its rulings that municipalities are not immune from the Sherman Act or any other federal antitrust statute. *Lafayette; Boulder*. In particular, it has specifically and expressly recognized that non-immune governmental action, such as the Berkeley Ordinance here, which fixes prices at which private parties provide services or commodities to the public, is in direct conflict with Section 1 of the Sherman Act. 15 U.S.C. § 1; *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Midcal*, 445 U.S. 97 (1980).

Because the antitrust laws stand as the bulwark of this nation's economic viability, the Court has cautioned against any casual grant of immunity from their coverage. "Antitrust laws in general and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the

Bill of Rights is to the protection of our fundamental personal freedoms." *Midcal,* 445 U.S. at 110-111 *quoting United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972).

Exemptions from these important federal procompetition policies are to be strictly and narrowly construed. *National Gerimedical Hospital v. Blue Cross of Kansas City,* 452 U.S. 378, 388 (1981); *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 231 (1979). Such construction reflects the recognition of the "indispensable role of antitrust policy in the maintenance of a free economy." *United States v. Philadelphia National Bank,* 374 U.S. 321, 348 (1963). In a line of uniform decisions, this Court has consistently refused to permit local governmental agencies to utilize their "public" character to pursue temporary parochial interests to the detriment of the enduring national policy favoring free and open competition in the marketplace. *Lafayette; Boulder;* and most recently, *Town of Hallie,* 53 U.S.L.W. 4418 (1985). *Compare: Parker v. Brown,* 317 U.S. 341 (1943) (hereinafter "*Parker*").

Relying on principles of federalism and state sovereignty, *Parker* delineated the "state action" exemption from federal antitrust laws in a case where an anticompetitive policy was pursued by state officers and agents at the specific direction of the state legislature. In *Parker,* this Court recognized that state action affecting the production of raisins produced in California was anticompetitive, and that Congress, in the exercise of its commerce power, could prohibit a state from maintaining such a program. Nevertheless, this Court ruled that Congress in its antitrust legislation, did not intend to prohibit such regulatory programs enacted by the state in its sovereign capacity. *See Southern Motor Carriers Rate Conference, Inc. v. United States,* 53 U.S.L.W. 4423, 4424 (March 27, 1985) (hereinafter "*Southern Motor Carriers*").

Parker and its progeny are uniform in finding state action immunity only in those instances where the anticompetitive conduct is undertaken by the state itself, or at its direction. Specifically, municipalities have no sovereign power and cannot, on their own initiative, advance their parochial interests through practices (such as price-fixing) which necessarily conflict with the pro-competition policies of federal antitrust laws.

Lafayette, 435 U.S. at 412-413; *Boulder,* 455 U.S. at 50-51. Indeed, Berkeley's rent-fixing ordinance can be shielded from federal antitrust scrutiny if, and only if, it was enacted pursuant to a "clearly articulated and affirmatively expressed" policy promulgated by the State of California in its sovereign capacity. *Lafayette,* 435 U.S. at 410-13; *Boulder,* 455 U.S. at 51-55.

Moreover, where, as here, the municipality is regulating and mandating private anticompetitive conduct, there must be supervision by the state sovereign. *Midcal,* 445 U.S. at 105. As this Court observed in *Town of Hallie,* 53 U.S.L.W. at 4421 n. 10: "Where state or municipal regulation of a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists." *See Southern Motor Carriers,* 53 U.S.L.W. at 4423.

The California Supreme Court, however, ignored this body of law. It ruled that price-fixing programs when created by a municipality (as opposed to private parties) were not to be measured by the per se standard, *Fisher v. City of Berkeley,* 37 Cal.3d 644, 667-71, J.S. App. A at A-21-26, and that municipalities acting on their own, without enabling state legislation or supervision, could assert a "public welfare" defense to any conflict with or violation of the Sherman Act. *Id.* at 673, J.S. App. A at A-28.

The California Supreme Court's ruling is patently wrong. *First,* this Court has consistently recognized that price-fixing programs are per se violations of Section 1 of the Sherman Act even if they are implemented by non-immune governmental action. *Midcal* and numerous other cases have uniformly condemned price-stabilization even where authorized or approved by state governmental agencies. *A fortiori* such a program mandated by mere municipal ordinance, as in our case, must give way to supervening federal law and policy.

Second, the evil effects of price-fixing in the marketplace are not diminished by the fact that such are promoted by municipal, rather than private conduct. Indeed, a governmentally mandated program is worse in that it includes a penal enforcement mechanism rather than being dependent on mere

informal private compliance. The massive anticompetitive impacts of the Ordinance here challenged are clear in that virtually every residential rental unit in the city is unequivocally compelled to comply with the ban on price competition under threat of criminal prosecution.

Third, the *Parker* " state action" exemption standards are relevant to preemption challenges of local laws as well as direct federal antitrust actions against municipalities. Indeed, *Parker* itself was a preemption case. *Lafayette* and *Boulder* are instructive as to an inquiry into Congressional intent pursuant to preemption analysis. As *Lafayette* made clear the word "exemption" is merely "a shorthand expression" for whether the Sherman Act was "intended by Congress to prohibit the anticompetitive restraint" imposed by municipalities. *Lafayette,* 435 U.S. at 393 n. 8. Thus a municipal ordinance which conflicts with the Sherman Act is preempted unless it was enacted pursuant to a clearly articulated and affirmatively expressed state law and there existed active state supervision of the anticompetitive private conduct mandated by that ordinance. This Court's ruling from *Parker* to *Town of Hallie* indicate that if a state or local anticompetitive program meets the state action exemption criteria, then Congress did not intend for the Sherman Act to apply. Hence, there would be no conflict between the federal statute's intended coverage and the local law. However, if the state action exemption requirements are not met, as in the case at bench where the court below acknowledged that California had no state rent control statute, then there is no immunity from antitrust laws, and the federal statutes, policies and standards take precedence over whatever conflicting local interests are sought to be advanced by the municipality involved.

Thus, when the California Supreme Court refused to apply the traditional federal per se illegality standards to the Berkeley rent-stabilization program, and, instead, carved out a "public welfare" defense for municipal programs, it in effect permitted municipalities to elevate their parochial local interests above important national antitrust policy, a result this Court strongly condemned in *Lafayette* and *Boulder.*

It is instructive that this Court's rulings circumscribing the scope of state action immunity for municipalities have recently been endorsed by congressional action. Following *Boulder* and *Lafayette,* there echoed in some circles an argument that those decisions would paralyze local governments and prevent their functioning. Although this argument was soundly rejected by this Court, its proponents renewed their efforts with intense lobbying efforts in Congress seeking effectively to overturn *Boulder* and *Lafayette.* However, in the Local Government Antitrust Act of 1984, 15 U.S.C. § 35, Congress rejected proposals which would have conferred broad antitrust immunity on official action by local governments.[10] Instead, Congress left unchanged this Court's unequivocal rulings that the state action immunity applies only to the state acting in its sovereign capacity or municipalities acting with the state's clear authorization.

The Local Government Antitrust Act of 1984 does not immunize municipal anticompetitive practices nor relieve them from scrutiny under traditional antitrust standards (such as the per se rule), but merely provides that the remedy of damages shall not be applicable to antitrust actions against local governments or to private parties acting pursuant to local governmental mandate. 15 U.S.C. § 35(a). In so doing, Congress rejected the notion that cities may disregard this nation's commitment to vigorous competition, affirmed the holdings of *Boulder* and *Lafayette* and responded to the legitimate concerns expressed by the dissents in those cases that exposing cities to antitrust damage actions would threaten their financial stability.[11]

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[10] In light of the California Supreme Court's ruling, it is particularly worth noting that Congress considered and rejected a proposal that would have exempted from antitrust scrutiny anticompetitive municipal conduct undertaken pursuant to a city's police powers. H.R. 5992, § 3, 98th Cong. 2d Sess. (1984), would have exempted municipalities from antitrust liability based on acts of government "reasonably undertaken to protect or provide for the public health, safety or welfare." Undaunted, the court below created its "public welfare" defense anyway.

[11] House Report, H.R. 98-965, articulates the Congressional reasoning for rejecting broad immunities for municipalities from the antitrust laws:

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The recent federal legislation and the body of law which this Court has carefully developed in defining the state action exemption from federal antitrust law has properly determined the balance which must be struck between national antitrust policy and local concerns. If something, such as the rent control program herein, is seen as an important and crucial local need, it can be implemented by a state legislative policy determination. The state may establish a regulatory regime to replace open competition in the rental market. If, however, as in the instant case, the state, as sovereign, has not identified rental price stabilization as necessary for the health, safety and welfare of its citizens, then a municipality may not take it upon itself to supersede the values of price competition which the Sherman Act requires. To allow such unauthorized municipal price-fixing, as urged by appellees below, would render the Sherman Act impotent to counteract many of the most equegious anticompetitive restraints that could be imposed by municipal government, effectively standing the supremacy clause on its head.

Appellants will show that the Ordinance must be invalidated because:

(a) It mandates price stabilization, a per se violation of Section 1 of the Sherman Act, and is, therefore, preempted under the supremacy clause;

(b) The Supreme Court of California, itself, acknowledged that "California has no state rent control statute." 37 Cal.3d at 655, J.S. App. A at A-6. Accordingly, there is no

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The Subcommittee did not adopt the concept of a ban against private actions aimed at municipalities and their officials. The role of "private attorneys general" in the antitrust enforcement scheme remains central. *If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.* The record does support, however, the notion that municipalities—and their taxpayers who must ultimately shoulder the burden—should not be subject to punitive sanctions in the form of treble damages. [*Id.* at 18; emphasis added.]

"clearly articulated and affirmatively expressed" policy of the State of California, as sovereign, to displace competition with regulation, pursuant to which the rent control ordinance may be validly enacted or immunized from federal antitrust preemption; additionally, the State of California, as sovereign, exercises no state supervision whatsoever over Berkeley's stringent regulation of private rental prices;

(c) The Court below erred in ignoring the governing standards established by this Court for assessing the propriety of municipal anticompetitive regulations and in creating its own "new" test for determining circumstances under which parochial local "public welfare" considerations constitute a "defense" to a claim of federal antitrust preemption. 37 Cal.3d at 673, J.S. App. A at A-28.

II. THE BERKELEY RENT CONTROL ORDINANCE IS PREEMPTED BY SECTION 1 OF THE SHERMAN ACT

Appellants here did not bring an antitrust suit for damages against the City of Berkeley and need not meet all of the technical requirements for maintaining a private action for price-fixing under Sections 4 and 16 of the Clayton Act. 15 U.S.C. § § 15, 26. Rather, this is a preemption challenge in which appellants claim that the Ordinance is in conflict with federal antitrust law and policy. As it was explained in this context to the U.S. Senate Judiciary Committee by noted antitrust authority Professor Phillip Areeda:

> It is exceedingly important to see that neither antitrust liability nor antitrust damages are necessary to hold, in any particular case, that the federal antitrust regime applies in preference to a federal or state regulatory effort. This is perfectly obvious at the federal level where, for example, a federal court may "invalidate" the regulation or decision of a federal agency because it interferes with competition more than Congress intended and is therefore beyond the authority of the officials in question. Such conclusions are routinely reached without any finding that the federal agency or its officials have violated the antitrust laws or are liable for antitrust treble damages.

Testimony of Phillip Areeda, Official Proceedings of the United States Senate Judiciary Committee, June 30, 1982.

Under the appropriate standards, a municipal ordinance is preempted by federal law and is unconstitutional under the supremacy clause if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, (1941); *see also: Nash v. Florida Industrial Comm'n.,* 389 U.S. 235, 239 (1967); *Jones v. Rath Packing Co.,* 430 U.S. 519, 526 (1977). As Professor Laurence H. Tribe has stated:

> [S]tate and federal laws need not be contradictory on their face for the latter to supersede the former; there are more subtle forms of actual conflict. Even if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie federal enactments. Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage.

L. Tribe, *American Constitutional Law,* § § 6-24 (Foundation Press, 1978).

The issue for the Court is thus squarely put: Does the Berkeley Ordinance which sets and fixes rental prices and which denies property owners' the freedom to change prices discourage price competition which the federal antitrust laws seek to encourage? The answer, appellants submit, is self-evident.

Under penalty of criminal prosecution, the Ordinance facially prohibits property owners from determining competitively the price at which they should rent their premises. As such it directly contravenes the important commitment to price competition as a national economic policy. Federal antitrust laws, particularly Section 1 of the Sherman Act, prohibit any program or combination which has the purpose and effect of "raising, depressing, fixing, pegging or stabilizing . . ." prices. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 (1940). The Berkeley rent control regulation is such a program in that is depresses, pegs and stabilizes rental prices for

residential property. Berkeley's rent-fixing program thus directly conflicts with federal antitrust law and policy, and clearly stands as an obstacle to the accomplishment and execution of the congressional policy favoring price competition. This showing is more than sufficient to invalidate the Ordinance under traditional preemption analysis.

This Court has consistently recognized the anticompetitive impact of governmentally imposed price-fixing and firmly held that such mandated price-fixing is in conflict with Section 1 of the Sherman Act unless immunized by the "state action" exemption of *Parker,* 317 U.S. 341. Thus, in *Schwegmann,* 341 U.S. at 389, this Court stated: "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids . . ." More recently in *Midcal,* this Court considered whether the Sherman Act preempted California's resale price maintenance and price posting statutes applicable to the sale of wine. It ruled that a governmentally imposed vertical price-fixing scheme is subject to the illegal per se analysis under the Sherman Act unless such price-fixing is accomplished pursuant to a clearly articulated and affirmatively expressed state policy and is actively supervised by the state itself. 445 U.S. at 105 *citing Lafayette,* 435 U.S. at 410. In *Midcal,* even though there was a clearly articulated and affirmatively expressed state statutory policy favoring vertical resale price maintenance, this Court nevertheless held the state program to be preempted under a per se illegality analysis of the Sherman Act, because the state did not actively supervise the program. 445 U.S. at 105-106.

Of course, not every non-immune state or local regulation which may have some anticompetitive effect is preempted by federal antitrust laws. In *Rice v. Norman Williams Co.,* 458 U.S. 654 (1982) (hereinafter "*Rice*"), Mr. Justice Rehnquist noted that a hypothetical or potential conflict between federal and state regulatory schemes may not be sufficient to warrant preemption. In *Rice,* the court upheld a California "designation statute" which gave liquor distillers the right to designate which wholesalers may import the distiller's product into the state. The state law thereby enforced the distiller's decision to restrain unauthorized wholesalers from bringing its products

into California and engaging in intrabrand competition with authorized wholesalers.

The Court observed that the practice of manufacturers in restricting the vertical distribution of their products is not a per se violation of the Sherman Act, citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-59 (1977) (hereinafter *"GTE Sylvania")* which recognized that *non-price* vertical restrictions on product distribution may reasonably encumber intrabrand competition in order to promote interbrand competition. Under *GTE Sylvania,* then, such non-price vertical restrictions in some circumstances may well be valid under a rule of reason analysis of the Sherman Act, by stimulating more effective interbrand competition. *Rice,* 458 U.S. at 661-662. Thus, in *Rice,* the Court could not find that the California "designation statute" would be facially and "in all cases" in conflict with Section 1 of the Sherman Act.

On the other hand, Mr. Justice Rehnquist distinguished cases such as ours where the state or local governmental regulation mandated price maintenance which has historically been held to be a per se violation. *Id.* at 659, citing *Midcal.* The Court went on to recognize that non-immune state or local programs are facially preempted by Section 1 of the Sherman Act when the conduct mandated (such as rental price stabilization here) is a per se violation. *Id.* at 661. Indeed, all price competition in the Berkeley rental market is interdicted by the Ordinance here challenged. The case at bench, then, is not similar to *Rice, Exxon Corp v. Governor of Maryland,* 437 U.S. 117 (1978) (hereinafter "*Exxon*"), or *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 60 (1966) which involved merely "potential conflicts" with federal antitrust laws "entirely too speculative . . . to warrant pre-emption . . . ." *Exxon,* 437 U.S. at 130-131, but rather a direct collision with the price competition mandate of Section 1 of the Sherman Act.[12]

As will be shown below, the Berkeley rent control ordinance is not merely a regulation which has some anticompeti-

[12] *Exxon,* moreover, involved a state's attempt, via a clearly articulated state statute, to prevent oil companies from engaging in discriminatory pricing practices in a manner wholly consistent with the policies of the Robinson-Patman Act. *Exxon,* 437 U.S. at 132-33.

tive effects and which creates only a speculative or hypothetical conflict with federal antitrust statutes; rather it prohibits price competition, the most essential component of federal antitrust policy. Such price stabilization programs are so pernicious in thwarting competition in the marketplace that they are invariably ruled to be in violation of or in conflict with Section 1 of the Sherman Act. The "public" nature of this price-fixing scheme in no way diminishes the adverse anticompetitive effects traditionally found in programs which interfere with prices. The harmful impacts on competition and on interstate commerce generated by Berkeley's rent control ordinance require the conclusion that the Ordinance directly conflicts with the Sherman Act.

A. The Berkeley Ordinance Mandates The Fixing And Stabilizing Of Rental Prices And Is Illegal Per Se Under Section 1 Of The Sherman Act.

This Court has never wavered in its view that price-fixing combinations are illegal per se under Section 1 of the Sherman Act. Restriction of price competition strikes at the very foundation of our federal antitrust policies. As this Court recognized in *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978):

> Price is the "central nervous system of the economy," *United States v. Socony Vacuum Oil Co.,* 310 U.S. 150, 226 n. 59, and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. *United States v. Container Corp. of America,* 393 U.S. 333, 337.

For this reason, it is not necessary for courts to inquire into the reasonableness, nor the good motives, nor the alleged advancement of a public interest which are often put forward to justify the tampering with prices. As stated in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. at 218:

> Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

Price-fixing and price restricting programs violate the Sherman Act without regard to so-called "public welfare defenses" and with no need to demonstrate specific anticompetitive impact on the economy or the marketplace. Price tampering and price stabilizing programs, such as Berkeley's rental price regulation are so contrary to federal procompetition policies that they are presumed illegal with no further inquiry. *See Midcal,* 445 U.S. 97. And this per se illegality is not diminished because a program or combination sets maximum rather than minimum prices (i.e., depresses prices or keeps them lower). *Arizona v. Maricopa County Med. Society,* 457 U.S. 332 (1982); *Albrecht v. Herald Co.,* 390 U.S. 145 (1968). Moreover, the fact that the price-fixing program is organized and mandated by governmental regulation does not save it from per se illegality. "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Schwegmann,* 341 U.S. at 389; *Midcal.*[13]

It cannot be denied that the Berkeley Ordinance creates a program and combinations which directly prohibit price competition. The rent fixing program vertically mandates that landowners stabilize the prices at which they rent their property and this, in turn, precludes horizontal price competition with respect to the 23,000 rental unit market. Section 10, J.S. App. G at A-122. The inevitable result is that, horizontally, price competition among landowners in Berkeley is improperly eliminated. *See, e.g., Midcal,* 445 U.S. at 103; *Albrecht v. Herald Co.,* 390 U.S. 145 (1968); *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960) and *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 384 (1911) (vertical price-fixing destroys horizontal price competition as effectively as if the rental property owners "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.") Moreover, such municipal price-fixing has absolutely no pro-competitive impacts.

[13] *Midcal* and *Schwegmann* invalidated regulatory price maintenance programs involving the sale of liquor, an activity particularly entrusted to state control by virtue of the Twenty-First Amendment to the United States Constitution. There is even less justification for local governmental price regulation of other goods and services such as is involved in the case at bench.

The prohibition on price adjustments also prevents adjustment of "non-price" features of a product, service or commodity. In housing, for example, price-fixing virtually eliminates esthetic improvements, security services and other 'quality' features through which landowners could compete. Thus, any diversity and innovation in the rental housing market are sacrificed in the pursuit of low prices. But, as this Court recently stated, the antitrust laws are "grounded on faith in price competition as a market force and not on a policy of low selling prices at the price of eliminating competition." *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348 (1982), *quoting* Rahl, "Price Competition and the Price Fixing Rule — Preface and Perspective," 57 N.W.U.L.Rev. 137, 143 (1962). A low price is, after all, not the sole objective either of consumers or of Congress, and elimination of price competition in pursuit of that parochial interest is beyond the constitutional capacity of the City of Berkeley. *Lafayette,* 435 U.S. at 408; *Boulder,* 455 U.S. at 50-51. As this Court recognized in *National Society of Professional Engineers v. U.S,* 435 U.S. at 695:

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain — quality, service, safety, durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

The opinion below, however, disregards decades of precedent by this Court, criticizes as "arbitrary" and "mechanical" the characterization of price-fixing as illegal per se and concludes that the per se rule of illegality does not apply to a municipal defendant's price-fixing ordinance. 37 Cal.3d at 651, J.S. App. A at A-1. The California Supreme Court cited *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979) as supporting this premise. 37 Cal.3d at 666, J.S. App. A at A-19. However, *Broadcast Music* is wholly different from the instant case. There, this Court observed that "blanket licensing" agreements

protecting copyrighted music were proper in light of previous stipulated consent decrees. *Id.* at 11-12 and 20. Of even greater significance was the fact that Congress, in the Copyright Act of 1976, 17 U.S.C. § § 111(d)(5)(A), 116(c)(4) and 118(b), authorized the use of blanket licensing practices as a means of preventing unauthorized use of copyrighted material. *Broadcast Music,* 441 U.S. at 15-16. There is no similar congressional approval of local rent controls or price fixing. The California court thus summarily and erroneously rejected the carefully evolved wisdom of this Court's rulings in *Midcal, Schwegmann, Lafayette* and *Boulder.*

The Ordinance is purely and simply a non-exempt, non-immune price fixing scheme which is in direct conflict with, and unlawful *per se* under Section 1 of the Sherman Act. In *Rice,* 458 U.S. at 659-60, this Court observed that in cases such as *Midcal* (and the case at bench), a governmentally imposed vertical price maintenance program *does* facially conflict with the Sherman Act because such price maintenance is "an activity that has long been regarded as a per se violation of the Sherman Act." And, as *Lafayette* and *Boulder* make clear, the circumstances under which *local* action may be preempted by the Sherman Act are considerably broader than in the case of *state* programs such as were examined in *Midcal* and *Rice.* The state court below disregarded *Schwegmann, Midcal* and *Rice* in refusing to apply a per se illegality analysis to the municipal rent-fixing ordinance and in refusing to find that control of price competition was facially inconsistent with and preempted by the Sherman Act.

B. Berkeley's Control Of Rental Prices Has Widespread And Far-Reaching Anticompetitive Impacts.

Appellees' price-fixing law eliminates price competition and flaunts the congressional policy of free competition. It thus represents "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers,* 435 U.S. at 695.

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition."

Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

The widespread anticompetitive impacts brought about by pervasive rental price control demonstrate the economic evils which result from such a program and require application of the per se illegality rule. It is beyond dispute that had the owners of the 23,000 rental units in Berkeley combined, on their own, to stabilize collectively the rental prices of their premises, such would violate the Sherman Act. The anticompetitive impact on the marketplace is identical where—as here—the same price stabilization is accomplished by municipal ordinance.

Local rent control ordinances result in a crazyquilt of local price-fixing programs (more than 50 in California alone); there is no justification in law or policy for permitting such an anticompetitive balkanization to exist simply because it is politically expedient within a particular municipality. As stated in *Lafayette,* 435 U.S. at 412-413:

> In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach. (Citation omitted.)

The serious "economic dislocation" which this Court warned against in *Lafayette* is an inevitable effect of local rent control. Justice Lucas in his dissent, below, 37 Cal.3d at 715-16, J.S. App. A at A-83-84, incisively described the myriad anticompetitive evils spawned by such programs:

> Economists are virtually unanimous in their condemnation of rent control laws. (E.g., Baird, *Rent Control: The Perennial Folly* (1980) pp. 54-78; *Rent Control, A*

Popular Paradox (The Fraser Institute edit. 1975) [essays by nine economists]; Muth, *Redistribution of Income Through Regulation in Housing* (1983) 32 Emory L.J. 691, 698; see also Rabin, *The Revolution in Residential Landlord-Tenant Law* (1984) 69 Cornell L.Rev. 517, 555 [quoting Ludwig von Mises' conclusion that governmental attempts to fix the price of a commodity make conditions worse].) In the view of most of these economists, rent control schemes cause what a Supreme Court plurality has called "serious economic dislocation." (See *Lafayette, supra,* 435 U.S. at pp. 412-413.)

. . . .

As previously indicated, just as maximum pricing of goods and services generally discourages entry into the market (see *Maricopa, supra,* 457 U.S. at p. 348), maximum rents have a negative impact on the production of new housing (Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws* (1984) 69 Cornell L.Rev. 604, 609-610; Siegan, *Commentary on Redistribution of Income Through Regulation in Housing, supra,* 32 Emory L.J. 721, 723), thereby inevitably putting an upward pressure on price as demand increases. In sum, the pernicious effects on the competitive market are many, apparent, and long-standing.

See generally, E. Block and E. Olsen, Bibliography in Rent Control — Myths and Realities (1981) citing more than 200 articles to this general effect.

The Ordinance plainly prohibits price competition and thereby inhibits competition in other elements of the rental bargain including quality, service and safety. It freezes rents of 23,000 units essentially at their June 1978 levels and allows increases only at the pleasure of city officials. The law is so restrictive that owners seeking rent increases merely sufficient to amortize necessary capital improvements, even those required for the health and safety of tenants, are subjected to an elaborate administrative hearing process (in which they have the burden of proof) in order to be eligible for any rent increase at all.

Thus, even aside from the per se analysis of Berkeley's rent-fixing program, it can be seen that the Ordinance here challenged produces the type of anticompetitive effects in the marketplace which the Sherman Act seeks to prohibit. If the California Supreme Court's refusal to apply the rule of per se illegality to municipal price-fixing programs is allowed to stand, local governments will be free to disregard the strong federal policy favoring price competition in pursuit of any number of parochial political interests or asserted public welfare considerations.

It is important to recognize that such "public welfare" justifications do not begin and will not end with residential rent controls. Berkeley has already regulated rental prices for commercial property in certain neighborhoods, Elmwood Commercial Rent Stabilization and Eviction Protection Ordinance, Berkeley, California Ordinance 5468-N.S. (June 8, 1982), pursuing an interest unrelated to the purported justifications offered below. Under the rationale advanced by appellees and embraced by the court below, Berkeley and other cities will be equally free to regulate the prices of food products, clothing, health care services and automobiles, to name just a few, because their citizens "need" these products and services. The policies of the Sherman Act must not be so casually disregarded. Individual cities must not be permitted to establish themselves as economic islands sheltering themselves from the national environment of price competition which is so essential to the economic vitality of this nation. Clearly, then, the Berkeley Ordinance embodies a local program which, under preemption analysis, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives . . ." of federal antitrust laws, *Hines v. Davidowitz,* 312 U.S. at 67; it mandates price-fixing which is illegal per se under the federal statute.

C. The Berkeley Rent Control Program Adversely Affects Interstate Commerce

It is axiomatic that Congress' power to regulate interstate commerce pursuant to Article I, § 8 of the Constitution is plenary. In enacting the Sherman Act, Congress "left no area

of its constitutional power unoccupied; it exercised all of the power it possessed." *United States v. Frankfort Distilleries,* 324 U.S. 293, 298 (1945).

In an authoritative analysis of the reach of Congressional jurisdiction under the commerce clause, *Perez v. United States,* 402 U.S. 146 (1971) (hereinafter "*Perez*"), held that interstate commerce was sufficiently involved in a single extortionate credit transaction which occurred wholly within one city. This Court ruled that if the class of activity involved substantially affects interstate commerce, then Congress can regulate the entire class and also reach individual incidents within the class even though a single individual incident does not in and of itself affect interstate commerce. 402 U.S. at 154; *see Wickard v. Filburn,* 317 U.S. 111 (1942) (wheat grown by one farmer wholly for home consumption purposes affects interstate commerce). *Wickard* and *Perez* are unquestionably applicable to the appraisal of interstate commerce in antitrust cases. *Mandeville Island Farm, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219 (1948); *Burke v. Ford,* 389 U.S. 320 (1967).

The Sherman Act is intended to reach those restraints, such as the rent-fixing program here challenged, which occur wholly within one city or one state, but which substantially affect interstate commerce. *United States v. South-Eastern Underwriters Ass'n.,* 322 U.S. 533 (1944); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *McLain v. Real Estate Board of New Orleans,* 444 U.S. 232 (1980) (hereinafter "*McLain*").

Jurisdiction under the Sherman Act may be established by a showing that the allegedly anticompetitive conduct contemplated by the rent control ordinance has an interstate effect "as a matter of practical economics." P. Areeda, *Antitrust Law,* paragraph 232-1c (Supp.1982); *see also, Turf Paradise Inc. v. Arizona Downs,* 670 F.2d 813, 818 (9th Cir. 1982), *cert. denied* 456 U.S. 1011 (1982). Justice Lucas' dissent below eloquently describes as a practical matter of economics the serious anticompetitive effects of interstate proportions which directly

flow from rent control.[14] One of these, a retardation in the production of new rental housing, directly affects the demand for financing and title insurance. *McLain* leaves no doubt that such a private combination would be well within the reach of the Sherman Act; that the actor is the city does not change the impact of the price-fixing program on interstate commerce.

Any further doubt as to the effect of rental property on interstate commerce was laid to rest last Term by this Court's ruling in *Russell v. United States,* 53 U.S.L.W. 4652 (June 3, 1985). In *Russell,* the defendant was prosecuted under a federal statute, 18 U.S.C., § 844(i), for attempted arson of his two unit rental apartment building. This Court unanimously rejected Russell's argument that his rental units did not affect interstate commerce:

> By its terms, however, the statute only applies to property that is "used" in an "activity" that affects commerce. The rental of real estate is unquestionably such an activity. We need not rely on the connection between the market for residential units and "the interstate movement of people," to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class.

Russell, 53 U.S.L.W. at 4653 (footnotes omitted).

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[14] An analysis by the Construction Industry Research Board based upon U.S. Department of Commerce data and models, states that 38,513 fewer rental housing units were built in California in 1983 as compared to 1978. This represented a loss of $1.7 billion in construction and 47,300 fewer jobs in construction employment. Moreover, this decrease in rental housing production resulted in 69,500 fewer nonconstruction jobs in California and 34,200 fewer jobs outside of the state. A publication by the Bay Area Council of San Francisco entitled, *Rental Housing in California: Obstacles and Opportunites* (April 6, 1983) found that rent control is a major barrier to investment in rental housing development projects in California even in communities without rent control ordinances. Of the mortgage lenders surveyed, 82% agreed that "[r]ent control is a threat to any new multifamily project in California, no matter where it is located. . . ." J.S. App. H, A-147-48. The report found that rent control was by far the most frequently named disincentive for multifamily lending in California.

Whether we are dealing, as in *Russell,* with a federal statute prohibiting arson or, as in the case at bench, with the Sherman Act which prohibits the fixing of prices, it is clear that congressional legislation reaches the rental property market.

III. THE BERKELEY RENT CONTROL ORDINANCE IS NOT IMMUNE FROM FEDERAL ANTITRUST STATUTES IN THAT IT WAS NOT ENACTED PURSUANT TO A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY.

A. California Has No Clearly Articulated And Affirmatively Expressed Policy Regarding Rent Control.

It is now undisputed that municipalities such as Berkeley are prohibited from taking action which violates federal antitrust statutes unless such action is taken pursuant to a clearly articulated and affirmatively expressed state policy. *Boulder; Lafayette.* From a reading of the opinion of the California Supreme Court, below, it is obvious that this standard has not been met with respect to the Berkeley rent control measure.

The Court below recognized that "California has no state rent control statute," reaffirming an earlier California Supreme Court ruling conceding the absence of any state statute addressing rent control. *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 141, 550 P.2d at 1010, 130 Cal.Rptr. at 474 (1976). This construction of state law by California's highest court is, at least, "instructive" in determining that there exists no clearly articulated or affirmatively expressed policy by the state, as sovereign, with respect to rent control. *Town of Hallie,* 53 U.S.L.W. at 4421, n. 8. Nevertheless, the California court ruled that even if a local government is not acting pursuant to a state policy, the per se rule of illegality does not apply to municipal price fixing, 37 Cal.3d at 751, J.S. App. A at A-1-2, and that municipalities can raise a "public welfare" defense to justify their anticompetitive regulations.

The Court below ignored the teachings of this Court and its carefully developed standards which reconcile interests of state sovereignty with national policies. As was recognized in *Lafayette,* 435 U.S. at 412-413, and reaffirmed in *Boulder,* 455

U.S. at 50-51, "Cities are not themselves sovereign. . . ." And as stated in *Lafayette,* 435 U.S. at 408:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

In two recent cases, this Court has reaffirmed the *Lafayette-Boulder* standard and upheld governmental claims of state action immunity only where state legislatures had clearly articulated and affirmatively expressed sovereign policies authorizing the very anticompetitive conduct which was being challenged. *Town of Hallie,* 53 U.S.L.W. 4418; *Southern Motor Carriers,* 53 U.S.L.W. 4423.

In *Town of Hallie,* several unincorporated townships in Wisconsin filed a federal antitrust action against neighboring City of Eau Claire alleging that the latter violated the Sherman Act by monopolizing the provision of sewage treatment services and by tying such services to the provision of sewage collection and transportation services.[15] In that case, this Court identified, described and quoted from specific state statutes which granted authority to Wisconsin cities to construct, add to, alter and repair sewage systems and to determine the areas to be served. Wisc. Stat. Ann. § 62.18(1) 1982; 53 U.S.L.W. at 4420. Moreover, Wisconsin legislation expressly provided that cities "may by ordinance fix the limits of such service in unincorporated areas" and "shall have no obligation to serve beyond the area so delineated." Wisc. Stat. Ann. § 66.069(2)(c); 53 U.S.L.W. at 4420. Additional Wisconsin legislation authorized the State Department of Natural Resources to require that a city's sewage system be constructed so that towns may connect to the system, however, such an order by the Department shall be void if the unincorporated territory refuses to become

[15] It is important to note that in *Town of Hallie* and *Southern Motor Carriers,* the plaintiffs had filed federal antitrust actions against the defendants. Our case is substantially different; appellants here merely seek a declaratory judgment that the Berkeley Ordinance is preempted by the conflicting policies of the Sherman Act.

annexed to the city. Wisc. Stat. Ann. § 144.07(1); 53 U.S.L.W. at 4420.

Thus, Wisconsin, as sovereign, expressly authorized the City of Eau Claire to engage in the very conduct — provision of sewage and delineation of the areas to be served — which was the subject matter of the antitrust suit. Eau Claire was acting pursuant to the state policy which granted it authority to engage in the specific conduct for which it was being sued. In the instant case, however, the California Supreme Court has recognized that the State of California has no rent control statute. Here, there is no clearly articulated and affirmatively expressed state policy pursuant to which Berkeley would be authorized to impose rent control.

In *Southern Motor Carriers,* the United States brought a federal antitrust action against a rate conference for fixing the rates for intrastate transportation of general commodities in four southern states. Again, this Court found very specific state statutory authorization for the challenged conduct. The Court found that, in all four states (Georgia, Mississippi, North Carolina and Tennessee), by statute, common carriers are allowed to agree on rate proposals subject to further supervision and continuing regulation by the respective *state* public utility commissions. 53 U.S.L.W. at 4426. Thus, in all four states, the state legislatures, acting as sovereigns, had made the critical policy determinations necessary to invoke *Parker's* state action immunity, i.e., the decision to replace competition with a regulatory statute, 53 U.S.L.W. at 4426:

> The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market.

The *Southern Motor Carriers* case represents this Court's most recent explication of the requisites for raising the state action immunity from antitrust laws and the reconciliation of antitrust and regulatory regimes at the state level. For immunity to exist, there must be express and affirmative state statutory provisions authorizing a policy of replacing com-

petition with regulation.[16] The four states in *Southern Motor Carriers* had enacted specific laws and policies at the state level demonstrating a commitment to regulation of intrastate rates (including the collective ratemaking practices, specifically authorized by the states, which were at issue in that case) instead of free and open price competition. *See also: New Motor Vehicle Board of California v. Orrin W. Fox Co.,* 439 U.S. 96, 109 (1978) where the Court found antitrust immunity in a state statutory scheme of regulation "designed to displace unfettered business freedom" with respect to establishment of new automobile dealerships. In the case at bench, however, California has adopted no such state legislative policy displacing competition in favor of rent control.

B. The California Legislation Relied Upon Below By Appellees Does Not Clearly Articulate Or Affirmatively Express A State Policy Authorizing Berkeley's Rent Control Ordinance.

In the proceedings below, appellees alluded to general housing statutes enacted by the State of California concerning a legislative scheme to plan and promote the improvement and development of housing.[17] Appellees contended that these statutes clearly articulated and affirmatively expressed a state sovereign policy pursuant to which the Ordinance was enacted.

A reading of these statutes makes it abundantly clear that they do not represent a commitment on the part of the legislature to displace competition with regulation in the rental housing marketplace, let alone to a regulatory program of rent control. Certainly appellees could not convince the California Supreme Court that these were rent control statutes. They do not clearly articulate or affirmatively express a state policy

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[16] As will be shown below, the existence of such an express state legislative policy satisfies only one of the two requirements of *Midcal.* To achieve immunity from federal antitrust laws, there must also be active *state* supervision of the anticompetitive practice. In *Southern Motor Carriers,* this supervision was abundantly present through *state* public utility commissions. In the instant case, there is absolutely no state supervision of Berkeley's rent control regulations.

[17] These statutes are set forth above in "Relevant Constitutional and Statutory Provisions Involved."

which authorizes Berkeley's fixing of rental prices for virtually every unit of private residential property within its jurisdictional boundaries. To hold that these statutes represent a state policy expressly displacing competition in favor of a regulatory regime would make a mockery of this Court's carefully developed standards for state action immunity from federal antitrust laws.

By their very terms, the California statutes cited by appellees and referenced above are *neutral.* The legislature in both its Government Code (§ 65589(b)) and in its Health and Safety Code (§ 50202) remained expressly neutral, at most, regarding the power of local governments to impose rent control; indeed in Health & Safety Code § 50202, the legislature stated: "Nothing in this division shall authorize the imposition of rent regulations or controls . . . [with limited exceptions not relevant here]". This legislative posture does not clearly articulate or affirmatively express a policy authorizing local rent control; indeed it would seem to do just the opposite.

In determining whether state legislation satisfies the clear articulation and affirmative expression standard, this Court has made it clear that a state posture of "neutrality" is not sufficient to confer antitrust immunity on locally mandated anticompetitive practices. Mr. Justice Brennan's opinion in *Boulder,* 455 U.S. at 55-56, is controlling in this regard:

> But plainly *the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance *is one of precise neutrality.* As the majority in the Court of Appeals below acknowledged: "[*W*]*e are here concerned with City action in the absence of any regulation whatever by the State of Colorado.* Under these circumstances there is no interaction of state and local regulation. *We have only the action or exercise of authority by the City."* 630 F.2d at 707. Indeed, Boulder argues that as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act. Cf. *City of Lafayette, supra,* at 414, and n. 44. Thus in Boulder's view, *it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition;* and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require. (Emphasis added.)

This language from *Boulder* is precisely and directly applicable to the present case. The statutory language of the State of California is expressly neutral at most — respecting local rent control. The state merely "allows its municipalities to do as they please" in imposing or not imposing rent control. Here, as in *Boulder,* we "have only the action or exercise of authority by the City." In California, one city may impose strict and widespread fixing of all rental prices (as does Berkeley), while another can impose less severe regulation, while still another can elect free-market competition. Under this system there is created a crazy-quilt of competitive and anticompetitive practices governing the same industry and affecting many others with no policy direction whatsoever from the state sovereign.

Under these circumstances, the strong and paramount federal economic policy favoring competition becomes subject to suspension not by virtue of the contemplative action taken by the state, based on a deliberate decision to substitute a regulatory regime for free market practices, but rather by one or more of the tens of thousands of local governmental units across the nation, acting upon some immediate parochial concern. In *Parker, New Motor Vehicle Board, Town of Hallie* and *Southern Motor Carriers,* the state legislatures involved made conscientious sovereign policy determinations to replace

free market pricing and other competitive practices with state supervised regulatory regimes. In California, the state legislature has adopted no such policy of replacing price competition with regulatory control of rental rates. The present situation approved by the court below is one empowering the cities to go about nonchalantly suspending free market pricing practices at will, whenever their parochial interests are furthered thereby.

In California, there is no state policy authorizing rent control, but rather a statutory statement that specifically withholds such authorization. Health & Safety Code § 50202. This is plainly sufficient to conclude that the state has not authorized rent control. To permit the state action immunity to shield Berkeley's non-state authorized rent-fixing program on such a tenuous or non-existent legislative foundation "would wholly eviscerate the concepts of clear articulation and affirmative expression" which are fundamental to the suspension of our federal commitment to competition, particularly price competition, as a basic national economic policy.

IV. THERE IS NO STATE SUPERVISION OF THE BERKELEY RENT CONTROL PROGRAM

Even accepting, *arguendo,* appellees' tenuous position, that the neutral California statutes clearly articulate and affirmatively express a state policy authorizing local rent control, state action immunity would still not be applicable as there is absolutely no state supervision whatsoever of Berkeley's program which regulates the prices which may be charged by private parties for rental housing. Nor are there even any state guidelines to moderate the most extreme impacts of the Ordinance on competition.

In *Midcal,* this Court established its two-pronged test for determining when governmental regulation of private conduct — such as in the instant case — is immune from federal antitrust laws. *Midcal* required both the clear articulation/affirmative expression of a state policy plus "active state supervision." 445 U.S. at 105. The instant case is identical to *Midcal* in many pertinent respects and, indeed, stronger in that unlike the *Midcal* plaintiff, appellants here challenge a municipal price fixing scheme rather than a *state* policy favoring regulation of liquor under the twenty-first amendment. Like *Midcal,* appellants here are not suing a governmental agency for violation of federal antitrust statutes, but merely seeking a declaratory judgment ruling that a governmental price-fixing program is in conflict with the letter and policies of Section 1 of the Sherman Act, hence preempted thereby under the supremacy clause. U.S. Const., Art. VI, Sec. 2.

Midcal's two-pronged test was expressly reaffirmed by this Court in *Southern Motor Carriers* last term. 53 U.S.L.W. 4423. In that case, the legislatures of the four states involved directed their respective state public utilities commissions to actively supervise and regulate the private rate setting activities. By contrast, in this case, there is absolutely no state supervision of Berkeley's rent-fixing program which regulates the pricing policies of rental property owners in Berkeley. Where, as here, a municipal regulation of private parties is involved, active state supervision must be shown. *Town of Hallie,* 53 U.S.L.W. 4418, 4421, n. 10. At the very minimum, state authorization for such a local price-fixing program should include guidelines and state supervisory powers to ensure that the state sovereign's purposes are being served without unnecessary conflict with the nation's economy.

V. THE COURT BELOW ERRED IN CREATING A "PUBLIC WELFARE" DEFENSE TO A LOCAL GOVERNMENT'S VIOLATION OF FEDERAL ANTITRUST LAWS AND POLICIES

The California Supreme Court quite simply refused to follow this Court's carefully developed standards for measuring the state action exemption from federal antitrust laws. Perhaps recognizing the patent lack of state authorization for appellees' price-fixing program, the state court ignored the forty-year history from *Parker* through *Lafayette* and *Bouider* culminating in *Town of Hallie* and *Southern Motor Carriers* which requires state authorization and supervision of local anticompetitive programs. Without such state participation, missing here, municipalities and their enactments enjoy no immunity from the Sherman Act.

Nevertheless, the court below focused on the perceived importance of a municipality's desire to implement rent control. In this respect, the lower court was misguided and failed fully to understand that this Court's test for the state action exemption is one which already establishes a delicate balance between local needs and federal antitrust policy. The "safety valve" for protecting local interests is found in the power of the state government to clearly articulate and affirmatively express the need for a regulatory regime to replace free market principles. This is evident in such cases as *Southern Motor Carriers* where the state legislature adopted a regulatory policy, replacing competition in governing transportation rates. *Parker* and *Town of Hallie* are to the same effect.

These cases illustrate the proper method for reconciling important local public welfare needs with national antitrust policy. It is for the state legislature, not a municipality, to define the "policy interest" to be served and to supervise actively the program established to prevent unauthorized anticompetitive practices from running rampant in excess of what is needed for the integrity of the regulatory program.

The state, however, has not adopted a policy to displace price competition with regulation with respect to the residential property rental market. It has neither authorized rent control nor established any system of active supervision of local rent-fixing programs. In short, none of the safeguards for reconciling a public welfare regulation policy with federal antitrust policy are present, and the California Supreme Court so conceded. Nevertheless, the court below, ignoring this Court's precedents, carved out a "public welfare" defense for the Berkeley's violation of the Sherman Act. What is most remarkable is that, in reaching its unsupportable conclusion upholding rent control, the court below completely disregarded

the traditional standards for either preemption or state action immunity, choosing, instead, to create a new judicial test:[18]

> Adapting the [United States Supreme] [C]ourt's commerce clause test to this facial section 1 attack on a municipal rent control ordinance, we conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. (Footnotes omitted.)

37 Cal.3d 675, J.S. App. A at A-31.

This "test" is borrowed, in part, from the traditional approach used by this Court to determine if a state or local enactment constitutes an undue burden on interstate commerce in cases where Congress has been silent respecting the subject matter of the regulation. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). It is a test used to inquire whether Congress, by its silence, intended to permit local regulation or to adopt a uniform policy of nonregulation of the subject matter involved. Clearly, this approach has absolutely no applicability where, as here, Congress in the Sherman Act has expressly and adamantly prohibited price maintenance programs or schemes.

But the ruling below did not just apply the wrong test, it also modified the test to make it virtually inevitable that in every case local interests will override federal antitrust policy:

> We will, however, depart from the United States Supreme Court's commerce clause test in one significant respect. We will not apply the wide-ranging essentially standardless

[18] The state court acknowledged that its approach was novel, asserting that resolution of the antitrust issues forced it to "wander off the map and travel cross country without the benefit of trail or compass." 37 Cal.3d at 663, J.S. App. A at A-15. But the court's predicament was one of its own making; it refused to follow this Court's teachings and created its own unprecedented test.

cost-benefit analysis employed in the court's recent "balancing" decisions.

37 Cal.3d at 675, J.S. App. A at A-30. Thus, an anticompetitive municipal ordinance will stand unless a plaintiff can carry the burden of showing that the local interest can be achieved as effectively by a means that would have a less intrusive impact on competition. In short, the California court's test permits municipalities to violate federal statutory antitrust policy if that is reasonably necessary to achieve some real or imagined local interest. The test will apply not only to ordinances which fix rental rates but also to laws which fix the price of any other service or commodity deemed important to the local public interest.[19]

The *Midcal* case makes it clear, however, that there is no room for balancing local interests, regardless of their importance, against the strong congressional mandate prohibiting interference with price competition. Plainly, the so-called "negative implication of the commerce clause" test used by the state court has no place in determining whether a local ordinance is in conflict with express federal statutory language or policy. *Hines v. Davidowitz,* 312 U.S. 51 (1941); *Nash v. Florida Industrial Comm'n.,* 389 U.S. 235 (1967); *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977); L. Tribe, *American Constitutional Law,* 6-2, 6-23 (Foundation Press, 1978).

This is not to say that some important local interests which require deviation from unfettered competition are unachievable. Indeed, this Court's prior rulings have provided the necessary "safety valve." If the state legislature, as sovereign, clearly articulates and affirmatively expresses a need to achieve a specific public purpose and chooses to accomplish that interest by limiting the forces of competition, even price

[19] The opinion below states that the "public welfare exemption would apply not simply to "traditional" or "integral" governmental functions, but also would immunize "all local actions rationally related to the promotion of local health, safety and welfare." 37 Cal.3d at 675 n. 27, J.S. App. A at A-31 n. 27. Thus, any city could fix the price of a myriad of commodities or services within the city limits, despite a negative interstate impact and a lack of state authorization or supervision.

competition, that state policy may be valid. *Parker,* 317 U.S. 341.[20]

Cities are not sovereigns and they are powerless to create a crazy-quilt of anticompetitive havens which are free from the coverage of federal antitrust policy. If rent control is important or essential to the public interest, advocates of such programs should direct their pleas and arguments to the state legislature, which in turn can strike the delicate balance between the perceived need for local price maintenance *vis a vis* the national importance of price competition. This is not a choice open to local governmental agencies or voters enacting laws through the initiative process, as was done here. For them it is all too easy to dismiss the long range importance and enduring value of competition in favor of urgent and immediate political or pocketbook pressures felt by a large body of tenant voters. The ruling of the California Supreme Court impermissibly permits these local, parochial interests and pressures to prevail over a national legislative policy which has guided this nation's economic destiny for a century.

[20] Legislatures in other states have clearly articulated and affirmatively expressed state policies authorizing local governments to enact rent controls. New York: N.Y. UNCONSOL. LAWS §§ 8581 et seq. (McKinney); Massachusetts: MASS. GEN. LAWS ANN. ch. 797, §§1 et seq. and 842, §§1-14 (West); New Jersey: N.J. STATS. ANN., §§2A, 42-74 and 42-77 (West); Maine: ME. REV. STAT. tit. 30, ch. 244. Appellants are aware of no municipality imposing rent control outside California without a specific state mandate to do so.

CONCLUSION

For the foregoing reasons, the decision of the California Supreme Court should be reversed and the Berkeley rent control ordinance declared preempted by the Sherman Act and unconstitutional pursuant to the supremacy clause.

DATED: July 31, 1985

Respectfully submitted,

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No. 84-1538.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN AND ANTHONY KERSHAW, INDIVIDUALS; AND LEVIN-ZEMEL, A CALIFORNIA CORPORATION,
Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, A MUNICIPAL CORPORATION; BERKELEY CITY COUNCIL; AND BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR APPELLEES

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QUESTION PRESENTED

Whether a municipal rent control ordinance, enacted by popular initiative in order to further state housing goals and to alleviate the social and economic ills of a housing crisis, may be treated as a private price-fixing conspiracy and condemned on its face as directly conflicting with the Sherman Act.

TABLE OF CONTENTS.

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. BECAUSE THE CITY OF BERKELEY'S RENT CONTROL ORDINANCE INVOLVES NO AGREEMENT OR CONSPIRACY TO RESTRAIN TRADE, SECTION 1 OF THE SHERMAN ACT IS WHOLLY INAPPLICABLE	13
A. No "Conspiracy" Among Landlords Is Authorized By The Rent Control Ordinance .	15
B. No "Conspiracy" Exists Between City Officials And The Landlords Who Are Subject To The Rent Control Ordinance	17
C. No "Conspiracy" Exists Between City Officials And The Tenants Who Are Protected by the Rent Control Ordinance	19
D. Berkeley's Rent Control Ordinance Has None Of The Special Features That Might Give Rise To A Finding Of A Section 1 Conspiracy Involving City Government	20

PAGE

II. EVEN IF THE ABSENCE OF A CONSPIRACY WERE NO BAR, THIS CHALLENGE WOULD HAVE TO BE DISMISSED, FOR THE ORDINANCE CANNOT BE HELD AN UNREASONABLE RESTRAINT OF TRADE 24

A. The Court Below Correctly Recognized That The Ordinance Cannot Be Condemned Under The Sherman Act Without Considering The Important Public Interests Served . 24

B. Given The Manifest Relationship Of This Ordinance To Important Public Interests, No Appropriate Rule of Reason Could Invalidate It 30

C. Regardless Of The Standard Employed, The Ordinance Cannot Be Invalidated *On Its Face* Until Judicial Experience Warrants The Creation Of A New *Per Se* Rule 33

III. EVEN IF THIS COURT WERE TO VIEW THE ORDINANCE AS OTHERWISE A SHERMAN ACT VIOLATION, MUNICIPAL RENT CONTROL IN CALIFORNIA IS SO PLAINLY CONTEMPLATED BY STATE LEGISLATION ESTABLISHING LOCAL RESPONSIBILITY FOR HOUSING THAT THE ORDINANCE IS NONETHELESS EXEMPT FROM THE SHERMAN ACT'S REACH 35

CONCLUSION 41

TABLE OF AUTHORITIES

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Affiliated Capital Corp. v. *City of Houston*, 735 F.2d 1555 (5th Cir. 1984) (en banc), *cert. pet. filed*, 53 U.S.L.W. 3509 (U.S. Dec. 14, 1984) 21n

Albrecht v. *The Herald Co.*, 390 U.S. 145 (1968) . 13, 14n

Amberhill Properties v. *City of Berkeley*, No. C-84-3407 (WHO) 5n

Appalachian Coals, Inc. v. *United States*, 288 U.S. 344 (1933) 41

Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) 34, 35n

Assoc. General Contractors v. *California State Council of Carpenters*, 459 U.S. 519 (1983) ... 29

Avery v. *Midland County*, 390 U.S. 474 (1968) .. 9n

Birkenfeld v. *City of Berkeley*, 17 Cal.3d 129, 550 P.2d 1001 (1976) 2, 3n, 25n, 36, 37

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California Liquor Dealers Ass'n v. *Midcal Aluminum*, 445 U.S. 97 (1980) 6, 15

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 19n, 20n

Campbell v. *City of Chicago*, 577 F.Supp. 1166 (N.D. Ill. 1983) 17n, 22n

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Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) 24

Cincinnati Riverfront Coliseum, Inc. v. *City of Cincinnati*, 556 F.Supp. 664 (S.D. Ohio 1983) 22n

PAGE

Citizens Against Rent Control v. *City of Berkeley*, 454 U.S. 290 (1981) 23n

City of Cleburne v. *Cleburne Living Center*, 105 S.Ct. 3249 (1985) 32

City of Eastlake v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) 9n

City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 7n, 10, 22n, 39n

Cleveland v. *United States*, 329 U.S. 14 (1946) .. 26n

Commonwealth Edison Co. v. *Montana*, 453 U.S. 609 (1981) 11n

Community Communications Co. v. *City of Boulder*, 485 F.Supp. 1035 (D. Colo. 1980), aff'd, 455 U.S. 40 (1982) 22n

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Copperweld Corp. v. *Independence Tube Corp.*, 104 S.Ct. 2731 (1984) 13, 14n, 18

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Dean Milk Co. v. *City of Madison*, 340 U.S. 349 (1951) 31n

Eastern Railroad Presidents Conference v. *Noerr Motor Freight*, 365 U.S. 127 (1961) 14, 19n, 20n

Eastlick v. *City of Los Angeles*, 29 Cal.2d 661, 177 P.2d 558 (1947) 37n

Eubank v. *Richmond*, 226 U.S. 137 (1912) 9n

Exxon Corp. v. *Gov. of Maryland*, 437 U.S. 117 (1978) 11n, 12, 32n

Fashion Originators' Guild v. *Federal Trade Comm'n*, 312 U.S. 457 (1941) 29n

PAGE

Garcia v. *San Antonio Metro. Transit Authority*, 105 S.Ct. 1005 (1985) 40, 41

Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 15

Goldstein v. *California*, 412 U.S. 546 (1973) 11n

Guthrie v. *Genesee County*, 494 F.Supp. 950 (W.D. N.Y. 1980) 22n

Hawaii Housing Authority v. *Midkiff*, 104 S.Ct. 2321 (1984) 23

Helvering v. *Hallock*, 309 U.S. 106 (1940) 26n

Heubeck v. *City of Baltimore*, 107 A.2d 99 (Md. Ct. of Appeals 1954) 41n

Hillsborough County v. *Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371 (1985) 28n

Huron Portland Cement Co. v. *Detroit*, 362 U.S. 440 (1966) 11n

Inganamort v. *Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973) 40n, 41n

Kassell v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981) 31

Kewanee Oil Co. v. *Bicron Corp.*, 416 U.S. 470 (1974) 11n

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) 14n

Kramer v. *Union Free School District*, 395 U.S. 621 (1969) 9n

Kurek v. *Pleasure Driveway & Park Dist.*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992, *antitrust judgment reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979) 22n

PAGE

Minnesota v. *Clover Leaf Creamery Co.*, 449 U.S. 459 (1981) 32n

Monsanto Co. v. *Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984) 18n

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Nash v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967) 11n

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Nat'l Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 28, 29, 31n, 34n

New Motor Vehicle Board v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978) 16n

New State Ice Co. v. *Liebmann*, 285 U.S. 262 (1932) 27

New York State Dep't of Social Services v. *Dublino*, 413 U.S. 405 (1973) 11n

Northwest Wholesale Stationers v. *Pacific Stationery and Printing Co.*, 105 S.Ct. 2613 (1985) ... 24, 34

Pacific Gas & Electric Co. v. *State Energy Comm'n*, 461 U.S. 190 (1983) 11n

Parker v. *Brown*, 317 U.S. 341 (1943) 16, 26, 35

Penn Central Transp. Co. v. *City of New York*, 438 U.S. 104 (1978) 6

Pinehurst Airlines, Inc. v. *Resort Air Serv.*, 476 F.Supp. 543 (M.D.N.C. 1979) 22n

Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429 (1978) 31n

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) .. 29

Rice v. *Norman Williams Co.*, 458 U.S. 654 (1982) 12, 13, 33, 35

PAGE

Ruckelshaus v. *Monsanto Co.*, 104 S.Ct. 2862 (1984) 23

Salyer Land Co. v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) 9n

Schiessle v. *Stephens*, 525 F.Supp. 763 (N.D. Ill. 1981) 22n

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) 15, 16

Scripps-Howard Radio v. *FCC*, 316 U.S. 4 (1942) . 26n

Southern Motor Carriers Rate Conference v. *United States*, 105 S.Ct. 1721 (1985) 36n

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State of Missouri v. *National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980) 19n

Supreme Court of New Hampshire v. *Piper*, 105 S.Ct. 1272 (1985) 32n

Taylor v. *Cole*, 201 Cal. 327, 257 P.2d 40 (1927) . 37n

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	PAGE
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Warren v. *City of Philadelphia*, 115 A.2d 218 (Pa. 1955)	41n
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Young v. *American Mini Theatres*, 427 U.S. 50 (1976)	6

Constitutional Provisions:

California Constitution, Article XI, § 3	36n

Statutes and Ordinances:

15 U.S.C.	
§ 1	*passim*
§ 2	5, 7n
§ 35 ("The Local Government Antitrust Act") ..	26
Cal. Govt. Code § 65300.7	38n
Cal. Govt. Code § 65302(c)	38n
Cal. Govt. Code § 65580	38

	PAGE
Cal. Govt. Code § 65581	38, 39
Cal. Govt. Code § 65583	38n
Cal. Govt. Code § 65589(b)	37
Cal. Health & Safety Code	
§ 1518(b)	37n
§ 50008(b)	37n
§ 51852.5(a)	37n
Berkeley Ordinance 5212	3
Rental Property Tax Relief Ordinance ("Measure I")	3
Tenants Rights Amendments Act of 1982 ("The Ordinance")	*passim*

Miscellaneous:

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

The issue in this case is whether Section 1 of the Sherman Act renders a city powerless to protect its citizens, by means of a democratically imposed government program of rent controls, from "the ill effects of the exploitation of a housing

shortage by the charging of exorbitant rents."[1] The precise question before the Court is whether such a municipal enactment to promote the public welfare may be treated, under Section 1, as if it were a price-fixing conspiracy by a cartel of private economic actors to swell their own profits.

Local rent control — a common urban response to a variety of housing problems[2] — came to the City of Berkeley on June 6, 1972. On that date, a popular initiative enjoying bipartisan support from both tenants and homeowners[3] enacted an amendment to the city charter to "alleviat[e the] hardship caused by rising and exorbitant rents exploiting a housing shortage in the city," *Birkenfeld* v. *City of Berkeley*, 17 Cal.3d 129, 136, 550 P.2d 1001 (1976). The rent control measure was expressly ratified by concurrent resolution of both houses of the California Legislature on August 2, 1972.[4] Rent controls were imposed to rectify a manifest market failure:

> On June 5, 1973, the City Council declared the existence of a housing emergency in the City of Berkeley, based upon the Council's finding of a pattern of steadily rising rents, a shortage of decent housing and an increased deterioration of the existing housing stock in the City.

Tenants Rights Amendments Act of 1982 ("the ordinance"), Part B, Section 2(c). JSA 110.

[1] *Fisher* v. *City of Berkeley*, 37 Cal.3d 644, 693 P.2d 261 (1984), Jurisdictional Statement Appendix ("JSA") 32. All citations to the opinion below will be to the JSA.

[2] Approximately 12% of the 26 million residential rental units in the United States are subject to rent controls. *See* Baar, "Guidelines for Drafting Rent Control Laws: Lessons of a Decade," 35 Rutgers L. Rev. 723, 725-726 n.1 (1983). Fully half of these, or nearly 1.5 million units, are subject to rent controls enacted by cities pursuant to their own, "home rule" police power. *Id.* at 725-26 n.1, 763; *see also* U.S. Bureau of Census, Census of Housing: 1970, Housing Characteristics for States, Cities & Counties. Rent controls are currently in effect in the District of Columbia, in New York City and several other municipalities in New York, and in approximately five cities in Massachusetts, including Boston, fifty cities in California, including Los Angeles, San Francisco and Oakland, and a hundred cities in New Jersey, including Newark and Jersey City. *See* 35 Rutgers L. Rev. at 725-29, 763.

[3] *See Birkenfeld* v. *City of Berkeley*, 17 Cal.3d 129, 146 n.14, 550 P.2d 1001 (1976).

[4] *Id.*, 17 Cal.3d at 137 & n.2.

After the first rent control program was invalidated by the California Supreme Court on due process grounds,[5] an interim rent control law was directly enacted by the Berkeley electorate in 1978 (Measure I). Upon its expiration in 1979, Measure I's provisions were modified and extended until the June 1980 city election, by the City Council's enactment of Ordinance 5212. On June 3, 1980, the Berkeley electorate passed Measure D, the rent control ordinance at issue here.[6] The goals of this rent control program, as stated in the ordinance itself are:

> . . . to protect tenants from unwarranted rent increases and arbitrary, discriminatory or retaliatory evictions, . . . to maintain the diversity of the Berkeley community, . . . to address the City of Berkeley's housing crisis, [to] preserve the public peace, health and safety and [to assure a home in the City for] low and fixed income persons, minorities, students, [the] handicapped, and the aged.

JSA 111. The ordinance states on its face that it was enacted as part of the City's obligation, under state law, to meet the housing needs of its residents.[7]

At no time has the City of Berkeley imposed a "rent freeze" in order to achieve these ends.[8] Nor does the present ordinance "fix" rents: the ordinance imposes only a ceiling on rent *increases*. Landlords thus remain free to compete for tenants by the traditional methods of lowering rents, improving services, and making improvements to their units to make them more attractive. Nor is even the ceiling on rent increases itself absolute. The City's Rent Stabilization Board ("the Board") — comprising nine Commissioners elected by Berkeley's voters —

[5] *See Birkenfeld, supra.*

[6] In 1982, amendments to Measure D were enacted by another initiative of the Berkeley voters. The ordinance was reviewed by the court below as amended, and is now before this Court in that form.

[7] JSA 109, 110.

[8] Contrary to appellants' mischaracterizations, *see* Appellants' Brief at 5, 6, neither Measure I nor Ordinance 5212 "froze" rents. Both measures allowed increases for documented increases in landlords' operating costs. *See* Measure I, § 12; Ordinance 5212, § 7.

reviews the situation annually, after making its own comprehensive surveys of prices and economic conditions and taking testimony at public hearings. *See* JSA 124. The ordinance mandates that the Board adjust rent ceilings upward in order to accommodate increases in utility costs, property taxes, maintenance costs and operating expenses. JSA 123.

In addition to this annual city-wide review, landlords may petition for individual rent increases. JSA 126. Such applications are promptly reviewed at public hearings, JSA 127-28, at which both tenants and landlords have a right to legal counsel and a right of appeal to the Board itself. *Id.* "[A]ll relevant factors" are considered in such applications, JSA 129, and the ordinance specifically provides that nothing therein shall prevent the Board from rectifying "cases of individual hardship" by "provid[ing] the landlord with a fair return on investment." JSA 130, 131. As the court below found, "the effect of inflation on a landlord's investment," JSA 42-43 & n.40, is among the considerations. Newly constructed rental units are exempt from rent control under the ordinance. JSA 114.[9] And should the housing crisis abate, as evidenced by a rental vacancy rate in excess of 5%, the City Council is empowered to decontrol rents. JSA 119.

When appellants challenged these provisions on their face,[10] the California Supreme Court concluded that Berkeley's rent control program was "reasonably related" to "'the alleviation of the ill effects of the exploitation of a housing shortage by the

[9] The ordinance can therefore hardly be the cause of any decline in rental construction that may exist. Contrary to their assertions, *see* Appellants' Brief 29 n.14, even appellants' own "Bay Area Council report," JS App. H — which is not part of the record — concluded that it is "the 'front-end' financing problem" (an issue of high interest rates) that is the primary cause of the rental housing shortage in the San Francisco Bay Area, JSA 141. So "pervasive and overriding" is this independent problem that it "obscure[s] the effects of . . . rent control," *id.*, and rent control becomes an issue only "[w]hen the economics of rental housing are set aside." JSA 147. In any event, this "report" does not purport to address the specifics of either the Berkeley housing crisis or the Berkeley ordinance, but instead deals in general terms with "Rental Housing in California," JSA 140.

[10] The Complaint alleged violations of due process, equal protection, and the right of privacy, an impairment of contracts and a taking without just compensation, all under both the federal and state constitutions, as well as violations of several state laws. *See* Joint Appendix ("JA") 4-5, 9.

charging of exorbitant rents to the detriment of the public health and welfare of the city and particularly its underprivileged groups,'" JSA 32, and held that the ordinance was not confiscatory and did not deny appellants due process, JSA 40, 52.[11]

The argument that federal antitrust law might preempt the ordinance was not advanced by any party to this case, and was in fact raised only in the California Supreme Court by an *amicus curiae* and then only after discretionary hearing in the case had been granted. *See* JSA 75. The complaint filed by appellants and dismissed below thus not only failed to allege preemption by the Sherman Act, but further failed to allege: (1) any facts that would support a finding that the ordinance has a significant effect on interstate commerce;[12] (2) any facts that would support a finding that the ordinance constitutes or is the result of a conspiracy to restrain trade;[13] and (3) any facts that would support a finding that the ordinance has any anticompetitive effect.[14] Appellants raise only a facial challenge to the ordinance, and there is no issue before this Court regarding the validity, under Section 1 of the Sherman Act or otherwise, of any application or invocation of the ordinance. And appellants make no claim before this Court that the rent control ordinance represents any monopolization or attempted monopolization in conflict with section 2 of the Sherman Act.[15]

[11] This Court dismissed appellants' appeal of these due process rulings for lack of a substantial federal question. 105 S.Ct. 2653 (1985). Therefore, even if the City of Berkeley felt as free to roam beyond the record as appellants have, *see, e.g.*, Appellants' Brief at 5 n.7, 7, 7-8 n.9, 25-26, 29 n.14, the wisdom of the means chosen by the Berkeley electorate to deal with the City's housing crisis is not in issue. In any event, on August 22, 1985, after taking testimony and reviewing thousands of pages of exhibits, the United States District Court for the Northern District of California, Judge William H. Orrick, presiding, granted judgment for defendant in *Amberhill Properties* v. *City of Berkeley*, No. C-84-3407(WHO). The District Court upheld the ordinance *as applied* over challenges, raised by a partnership of Berkeley landlords, that it denied them due process and equal protection and that it so deprived them of a reasonable return on their investment as to constitute a taking without just compensation.

[12] *See* the Complaint, JA 2-9.

[13] *See id.*; *Fisher* v. *City of Berkeley*, JSA 32, 35.

[14] *See* JA 2-9.

[15] Nor could they, since the City of Berkeley is neither a significant producer nor a significant purchaser of rental housing. Even if future planned construction

SUMMARY OF ARGUMENT

An agreement among landowners to restrict the sale, use, or rental of their property might well constitute a combination in restraint of trade and could, if it were to fix prices or rents, constitute conduct illegal *per se* under section 1 of the Sherman Act. Similarly, price maintenance agreements among landowners and those to whom they sell or rent, regarding re-sale or sub-leasing, might well implicate section 1. The present case would raise these same issues if the City of Berkeley had "simply authorized" rent-setting — either horizontally among landlords, or vertically among landlords and their tenants — and then merely "enforce[d] the prices established by [these] private parties." *California Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). That might well entail a *private* combination in restraint of trade that mere governmental approval could not save. But that is not this case.

Here, by contrast, the City of Berkeley, pursuant to the direct vote of a majority of its electorate, has imposed a uniform *public* regulatory regime of its own design, in which maximum rent increases are set and adjusted not by private entities, but rather by a popularly elected municipal agency with its own investigative and enforcement powers. Berkeley's rent control program is no more problematic under the Sherman Act than is any other municipal imposition of general public restrictions that private businesses might regret — for example, New York City's imposition of the development restrictions at issue in *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978); Detroit's imposition of the adult-theater zoning at issue in *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976); or Belle Terre's imposition of the limits on landlords' choice of tenants at issue in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974).

is included in the tabulation, the Berkeley Housing Authority's public housing units constitute no more than one third of one per cent of the rental housing stock in the City. No argument has been or credibly could be made that the rent control ordinance is part of some sort of predatory pricing scheme by the City of Berkeley to drive all landlords out of business and thereby to corner the market on rentals within its jurisdiction.

The question here is whether Berkeley's governmental rent regulations may be treated, under section 1 of the Sherman Act,[16] in the same way that a private producer's coercive imposition of price restraints upon its wholesalers and its dealers would be. The court below rightly held that it cannot. The test crafted by the court below — holding the rent control ordinance facially reasonable, for Sherman Act purposes, because sufficiently related to the public welfare — properly respects this Court's caveat that "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."[17] Whether or not this Court endorses that particular test, the judgment below, dismissing appellants' facial Sherman Act attack on Berkeley's rent control ordinance, must be affirmed, for any one of three independent reasons.

First, no such facial attack could succeed unless the ordinance either authorizes or embodies a "contract, combination . . . or conspiracy" forbidden by section 1 of the Sherman Act. But the ordinance plainly involves no such conspiracy. Indeed, to find this essential element of section 1 in the ordinance would be to hold the social contract itself to be less a metaphor for our collective obedience to democratic majorities than a literal conspiracy in restraint of trade. *See* section I *infra*.

Second, even if the Berkeley ordinance were held somehow to involve a "conspiracy" that could trigger scrutiny under section 1 — or if the absence of such an agreement were deemed no bar to an antitrust attack — that ordinance still could not be held on its face to be the sort of restraint of trade the Sherman Act condemns as unreasonable, whether according to the test advanced by the court below, or under any other test appropriate to an antitrust challenge brought against a municipal government. To hold otherwise would be to forbid

[16] Appellees press no claim that Berkeley's rent control ordinance is an attempted monopolization preempted by section 2 of the Sherman Act. *See* Statement of the Case and n.15 *supra*.

[17] *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 417 n.48 (1978); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 57 n.20 (1982).

cities to engage in a wide range of standard public regulation that in no way violates the terms or purposes of the antitrust laws. *See* section II *infra*.

Third, even if both of those grounds were rejected, the judgment below would nonetheless have to be affirmed because the State of California has legislatively required its municipalities to ensure affordable housing for their citizens, empowering them to do so by rent control if they wish, and in any event fully contemplating that fulfillment of this state-imposed requirement might impair the competitive freedom of landlords. *See* section III *infra*.

ARGUMENT

Appellants' entire argument to this Court rests on a single premise — one that is fundamentally wrong. Appellants assume that a democratic decision by a city to regulate prices is no different from a conspiracy by private economic actors to engage in price-fixing. Because a cartel of landlords banding together privately to set city-wide limits on apartment rents would violate section 1 of the Sherman Act *per se*, appellants argue, the City of Berkeley's decision by majority vote to enact rent control must do so too. According to appellants, it simply does not matter that it is a *city*, and *not* a private cartel, that is regulating rents.[18]

Such a view distorts beyond recognition the role of cities in our system of government. No decision of this Court has ever held or even intimated that legislation by local democracy is the mere equivalent of agreement by private cartel.[19] To the

[18] *See* Appellants' Brief at 25 ("It is beyond dispute that had the owners of the 23,000 rental units in Berkeley combined, on their own, to stabilize collectively the rental prices of their premises, such would violate the Sherman Act. The anticompetitive impact . . . is identical where — as here — the same price stabilization is accomplished by municipal ordinance."). *See also id.* at 13, 21-24.

[19] Cities, for example, are subject to constitutional norms inapplicable to private economic actors. As Justice White wrote for the Court almost two decades ago, "[t]he actions of local government *are* the actions of the State. A

contrary, as the Chief Justice wrote for the Court nearly a decade ago, when a city itself legislates directly through its voters, as did the City of Berkeley in this case, its decisions simply cannot be equated with mere expressions of preference on the part of narrow private interest groups.[20]

These fundamental differences between cities and private economic actors, so crucial in the constitutional context, do not evaporate in the antitrust context. It is true, of course, that this Court has held that cities, like private parties and unlike states, are powerless to *exempt* themselves from the reach of the Sherman Act. *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982).[21] But that decision did *not* reduce cities to the status of private economic actors for purposes of determining Sherman Act *violations*. Although the Court declined to accord cities the power to exempt themselves altogether from the Sherman Act in part out of a fear of local parochialism,[22] this concern hardly implied that a city's constituency is so narrow and insular that cities are to be equated with private corporations beholden only to their shareholders. Rather, as a majority of this Court expressly cautioned in

city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law." *Avery* v. *Midland County*, 390 U.S. 474, 480 (1968). Thus cities are subject to the one person, one vote principle, while private organizations of landowners are not. *Compare Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), *with Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

[20] *See City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 678 (1976) (Burger, C.J.) ("the standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decisionmaking by the people through the referendum process"). *Compare Eubank* v. *Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928).

[21] Both cities and private parties may be exempted from the Sherman Act by the action of a state. But even in determining entitlement to such a state action exemption, cities and private parties are treated differently. For example, unlike private parties, who can enjoy a "state action" exemption for state-authorized anticompetitive activity only if closely supervised by the state, cities are free to engage in state-authorized anticompetitive activity without any state oversight whatever. *See Town of Hallie* v. *City of Eau Claire*, 105 S.Ct. 1713, 1720 (1985), discussed in n. 77 *infra*.

[22] *See Town of Hallie*, 105 S.Ct. at 1721.

Boulder, the vulnerability of cities for antitrust violations will differ from that of private parties, for "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." *Id.* at 57 n.20 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 417 n.48 (1978)). *See also Boulder*, 455 U.S. at 59 (Stevens, J., concurring) ("the violation issue is separate and distinct from the exemption issue").[23]

Undaunted by this admonition, appellants wholly ignore the fact that Berkeley is a city, not a private cartel. They contend that Berkeley's rent control ordinance is automatically preempted by the Sherman Act because it "mandates the fixing and stabilizing of rental prices,"[24] and private price-fixing conspiracies have long been deemed illegal *per se* under section 1 of the Sherman Act.[25] The argument has a disarmingly simple ring, but it is too simple by half. For city-imposed rent control is *not* price-fixing by private conspiracy. And no decision of this Court (or any other) has ever suggested that public regulation of prices by a *city government* automatically violates or is preempted by anything in the Sherman Act.

Indeed, appellants seek to have the matter both ways: to overcome the absence of any precedent that would dictate automatic *preemption* of a price control ordinance, they would simply equate municipal price control with private price fixing. But to avoid the need to establish any *violation* of the Sherman

[23] Nor should this different treatment of city governments and private interests in the antitrust context seem at all surprising. As this Court reiterated just last Term, a private party engaging in anticompetitive activity is presumed to be "acting to further his own interests, rather than . . . governmental interests." *Town of Hallie*, 105 S. Ct. at 1720. By contrast, the Court will "presume, absent a showing to the contrary, that the municipality acts in the public interest." *Id.* at 1720. *See also* 105 S.Ct. at 1720 n.9 ("Among other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some states are subject to 'sunshine' laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process. Such a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties.").

[24] Appellants' Brief at 21.

[25] *Id.* at 21-24.

Act of a sort they would indisputably have to show if seeking declaratory or injunctive relief against purely private conduct, appellants conveniently ignore their own equation of public controls with private cartels and put forth the thesis that municipal rent control legislation may be "in conflict with federal antitrust law and policy,"[26] whether or not directly violative of a specific provision of the Sherman Act.[27] But no such expansive view of federal preemption doctrine is tenable here.

As appellants would cast it, the sole issue this case poses is whether a municipal ordinance which puts a ceiling on rents "discourage[s] price competition which the federal antitrust laws seek to encourage," and thus offends the Supremacy Clause.[28] But that is not, and has never been, the standard for federal preemption. The force of this Court's repeated admonition that preemption must not be inferred absent genuine *conflict* between national and local law[29] may not be escaped by casual invocation of those decisions of this Court that protected the day-to-day operation of federal agencies or programs from even indirect state or local frustration.[30] For this Court has uniformly refused to translate such rulings into a nebulous doctrine that preempts state or local action whenever its effects may be said to undercut some of the goals, most broadly and abstractly stated, of a congressional enactment.[31]

This Court has only recently reaffirmed this precise view with respect to federal preemption in addressing claims of

[26] Appellants' Brief at 17.

[27] *See* Appellants' Brief at 17-18, 21, 27.

[28] Appellants' Brief at 18.

[29] *See, e.g., De Canas* v. *Bica*, 424 U.S. 351, 357-58 & n.5 (1976); *New York State Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 423 n.29 (1973); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 446 (1966).

[30] *See, e.g.*, Appellants' Brief at 18, 40, citing *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235, 239 (1967).

[31] *See, e.g., Pacific Gas & Electric Co.* v. *State Energy Comm'n*, 461 U.S. 190, 222-23 (1983) (federal goal of promoting nuclear power development); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 663 (1981) (federal goal of promoting commercial coal use); *Exxon Corp.* v. *Gov. of Maryland*, 437 U.S. 117, 131-32 (1978) (federal goal of promoting private competition). *See also Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 491-93 (1974); *Goldstein* v. *California*, 412 U.S. 546, 561-70 (1973).

conflict with the Sherman Act. As the Court reiterated in *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982), there can exist an irreconcilable conflict between a state regulation and the Sherman Act warranting facial invalidation only if the state regulation, in all of its possible applications, gives effect to an actual *violation* of the Act. *Id.* at 661.[32] Regulation that does not effect such an actual violation is not invalid under the Supremacy Clause, for "a state statute is not pre-empted by the federal antitrust laws simply because it might have an anti-competitive effect," *Rice*, 458 U.S. at 659 — even one that some might label "pernicious in thwarting competition."[33] *Accord, Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133 (1978), *cited in Boulder*, 455 U.S. at 57 n.20.

This limitation on the preemptive reach of the Sherman Act must apply with equal force to municipal regulation. For no member of this Court has disagreed with the proposition that, "[i]f municipalities are permitted only to enact ordinances that are consistent with the procompetitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed," *Community Communications Co.* v. *City of Boulder*, 455 U.S. at 67 (Rehnquist, J., dissenting) (citing *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. at 133) — a consequence the entire Court has disclaimed any intention of inviting. *See Boulder*, 455 U.S. at 57 n.20 (citing *Exxon*, 437 U.S. at 133).

Appellants offer no reason why this should be the first case ever in which local legislation that neither violates the Sherman Act, nor authorizes any private violation of the Act, should be held preempted under some ethereal penumbra of the Act. Launching any such novel and expansive view of Sherman Act preemption here would put cities in an untenable double bind: while as powerless as private parties to *exempt* themselves

[32] As Justice Rehnquist wrote for the Court in *Rice*, "a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases" — that is, "when the conduct contemplated by the statute is in all cases a *per se* violation." 458 U.S. at 661.

[33] Appellants' Brief at 21.

from the Sherman Act, cities would be denied the privilege private parties enjoy of ordering their economic affairs as they wish so long as they do not actually *violate* the Act.

Accordingly, appellants' loose misreading of preemption principles must be rejected, and, following the principle put forth in *Rice* v. *Norman Williams Co.*, the rent control ordinance enacted by the people of the City of Berkeley can be facially condemned only if it effects or embodies a *violation* of section 1 of the Sherman Act. For the reasons that follow, this ordinance plainly does not.[34]

I. BECAUSE THE CITY OF BERKELEY'S RENT CONTROL ORDINANCE INVOLVES NO AGREEMENT OR CONSPIRACY TO RESTRAIN TRADE, SECTION 1 OF THE SHERMAN ACT IS WHOLLY INAPPLICABLE.

Section 1 of the Sherman Act is not addressed to unilateral conduct, even that which is anticompetitive. *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S.Ct. 2731, 2740 (1984); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149 (1968). It applies only when two or more persons or separate entities act together to form a "contract, combination . . . or conspiracy in restraint of trade or commerce." No such conspiracy is conceivably present in the operation of the Berkeley ordinance on its face.

Not surprisingly, appellants are remarkably vague in their brief about what sort of conspiracy they think is present. Indeed, the words "contract," "combination," "conspiracy," and "agreement" never even appear in appellants' descriptions of Berkeley's supposedly illegal conduct.[35] To their credit, appellants nowhere attempt to argue that the conspiracy consisted of rent control proponents' joint efforts to get the rent control

[34] *See* sections I & II *infra*. Even if the ordinance were a violation, it would nonetheless be exempted from the Sherman Act because authorized by the State of California. *See* section III *infra*.

[35] Appellants characterize the Berkeley ordinance simply as a "rent-fixing" or "price-fixing *program*." *See, e.g.*, Appellants' Brief at 13, 18, 22, 24, 25 (emphasis added).

measure placed on the ballot and passed by the electorate. Such an argument would, of course, be hopeless in light of this Court's holding in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 136 (1961), that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint" on competition.[36]

Nor do appellants anywhere suggest that the relevant conspiracy is among the different arms of the city government named as defendants: namely, the City itself as a municipal corporation, the City Council, and the City's Rent Stabilization Board. Such an argument would likewise have been futile, for it is well-settled law that "[c]oncerted action by persons within a single . . . enterprise is not a 'contract, combination . . . or conspiracy' within the meaning of section 1." P. Areeda, *Antitrust Analysis* 395 (3d ed. 1981). Just as divisions or other internal units of a corporation cannot be found to have conspired among themselves in violation of section 1,[37] and just as a parent corporation and its wholly-owned subsidiary "are incapable of conspiring with each other,"[38] so agencies of a single government cannot be found co-conspirators. To hold otherwise would create a self-proving section 1 conspiracy in virtually every government program.[39]

[36] The Court in *Noerr* construed the Sherman Act in light of the First Amendment, observing that "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives," 365 U.S. at 137, and that to hold lobbying to be an antitrust violation would be to "invade [the] freedoms" protected by "the right of petition," *id.* at 138. Such principles must apply *a fortiori* in the context of a direct voter initiative such as Berkeley's enactment of rent control.

[37] *See, e.g., Copperweld Corp.* v. *Independence Tube Corp.*, 104 S.Ct. at 2741-42.

[38] *Id.* at 2745.

[39] Nor is there any basis for treating the Berkeley City Council or the Berkeley Rent Stabilization Board either as outside contractors or "pawns" capable of conspiring with the city, *see, e.g., Albrecht* v. *The Herald Co.*, 390 U.S. 145 (1968) (newspaper publisher held to have conspired with outside subscription-solicitor and paper-deliverer to fix resale prices), or as separately incorporated subsidiaries of the city capable of conspiring between themselves, *see, e.g., Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951) (commonly-owned but separately incorporated subsidiaries capable of section 1 conspiracy with each other). The City of Berkeley as a whole, the Berkeley City Council, and the Berkeley Rent Stabilization Board are simply interconnected organs through which a single polity — the people of the City of Berkeley — governs itself.

Thus there are only three characterizations of the ordinance by which appellants could possibly hope to transform its operation into a "conspiracy": namely, that it enforces a "conspiracy" among landlords; that it embodies a "conspiracy" between landlords and the city; or that it embodies a "conspiracy" between tenants and the city. None of these "conspiracies" is even remotely present in this case.

A. No "Conspiracy" Among Landlords Is Authorized By The Rent Control Ordinance.

Appellants rely heavily on several cases in which this Court has held that the Sherman Act preempts state laws allowing *private* economic actors to engage in price-fixing among themselves, wholly unsupervised by the state. *See California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). But such cases are wholly irrelevant here.

In each of those cases, this Court held invalid under the Sherman Act a statutory scheme that gave effect to privately initiated restraints of trade. In *Midcal*, the Court held a California statutory scheme to be facially preempted by the Sherman Act because it allowed private wine producers *themselves* to impose vertical price restraints on wine retailers by fixing the resale prices of their wines in fair trade contracts.[40] In *Goldfarb*, the Court invalidated a state scheme allowing attorneys, through their bar association, to set fixed fee schedules of *their own choosing*, subject to no examination or oversight by the state's highest court.[41] And in *Schwegmann Brothers*, the Court ruled

[40] Because these price schedules were subject to no state supervision, they were simply private price-fixing agreements dressed in a "gauzy cloak of state involvement" that could not shield them from illegality *per se*. 445 U.S. at 105-06.

[41] 421 U.S. at 790-91. The Court found that the state bar had "voluntarily joined in what is essentially a private anti-competitive activity." *Id.* at 792.

that the Sherman Act, as amended by the Miller-Tydings Act, precluded a state from empowering private liquor distributors to dictate whatever minimum resale prices *they* wished to all retailers of their products, without any supervision by the state.[42] Each of these decisions simply reflected the principle that a state may not ratify unsupervised private restraints of trade: "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful," *Parker* v. *Brown*, 317 U.S. 341, 351 (1943).

In stark contrast to the laws at issue in those cases, the Berkeley rent control ordinance neither mandates nor authorizes *any* private price-fixing. The ordinance, quite obviously, has not authorized landlords to fix rental price ceilings among themselves. Indeed, the ordinance sets maximum rent increases directly contrary to the desires of the landlords. As appellants themselves point out,[43] the voice of the City's Rent Stabilization Board in determining rents is by no means the passive echo of the landlords' wishes; if it were, appellants would probably never have filed a complaint. Rent control in Berkeley was inaugurated, was implemented, and continues to operate by the unilateral command of municipal authority — not under a "gauzy cloak" of government supervision. This is not even arguably a case in which a government "demands *private* conduct which the Sherman Act forbids," *Schwegmann Bros.*, 341 U.S. at 389 (emphasis added).[44]

[42] 341 U.S. at 386-88. This was nothing more than an attempt "to authorize and immunize private conduct violative of the antitrust laws." *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 110 (1978) (describing *Schwegmann Brothers*).

[43] Appellants' Brief at 6-7.

[44] Were this such a case, it would, of course, make no difference whether the government demand emanated from a city acting on its own or from a city acting under explicit state authorization: what a state may not do under the Supremacy Clause it may not empower its cities to do.

B. No "Conspiracy" Exists Between City Officials And The Landlords Who Are Subject To The Rent Control Ordinance.

Appellants also suggest that the city has entered into a vertical agreement with the landlords whose rents are regulated by the Berkeley ordinance: "The rent fixing program vertically mandates that landowners stabilize the prices at which they rent their property . . ."[45] Appellants' theory seems to be that private parties, by virtue of being compelled to abide by duly enacted municipal laws, have somehow entered into an agreement or conspiracy with the city government.[46] If ever embraced, this notion would transform virtually all municipal laws that incidentally affect competition or impair someone's business into self-proving antitrust conspiracies, for all laws and regulations are in a literal sense "vertical mandates."

Under appellants' theory, even a municipal program requiring private parking garages to charge uniformly high rates, and imposing a uniform ceiling on taxicab fares — both in order to curb personal auto use in a congested city — would automatically constitute a pair of "vertical conspiracies" between the city and two private groups. Under that theory, the city government — even if it acted solely to address the wholly legitimate municipal concern of solving traffic problems[47] — would be deemed to have conspired in violation of the Sherman Act with both the private parking garages and the cab companies, because those parties must all comply with such duly enacted regulation, however bitterly they might resent it and however vigorously they might protest.

Appellants' theory would also transform virtually all general municipal zoning ordinances into "vertical conspiracies" be-

[45] Appellants' Brief at 22.

[46] Indeed, appellants argue that laws passed by a government are "worse" than private conspiracies because the former include "a penal enforcement mechanism." Appellants' Brief at 13. This notion turns the concepts of illegality, on the one hand, and respect for law, on the other, completely on their heads.

[47] A city government motivated by illicit concerns presents an altogether different situation, addressed in section I.D. *infra*. *See, e.g. Campbell* v. *City of Chicago*, 577 F.Supp. 1166 (N.D. Ill. 1983), and other cases discussed in n.55 *infra*.

tween cities and real estate developers or businesses to divide up, and limit to particular uses, territory that otherwise might have been parceled out and developed in accord with market forces. Surely the antitrust laws were not meant to invite wholesale judicial review of local zoning decisions.

Fortunately, appellants' theory is without merit. Berkeley's rent control ordinance bears no resemblance whatever to the sort of vertical price-fixing conspiracies this Court has held illegal under section 1. The City of Berkeley has not entered into any *agreement* with landlords that sets a cap on the rents they may charge: it has unilaterally *compelled* them, by force of law, to so limit their rents. In a normal resale price maintenance scheme, if a manufacturer faces widespread noncompliance by its dealers with its desired prices, there is little it can do *unless* it can coax the dealers into a binding contract, since terminating all the recalcitrant dealers could never serve the manufacturer's interests. The landlords of Berkeley enjoy no such entitlement to disobey and thus no similar opportunity to acquiesce; rather, the City achieves universal compliance by the routine governmental expedient of enforcing criminal sanctions against violators.

In *Copperweld*, this Court concluded that "the very notion of an 'agreement' in Sherman Act terms between a parent [corporation] and a wholly owned subsidiary lacks meaning," because "the parent may assert full control at any moment if the subsidiary fails to act" in accord with the parent's commands. 104 S.Ct. at 2742. Although the City of Berkeley is by no means the "parent" of the landlords, it is equally meaningless here to speak in terms of an "agreement" or a "meeting of minds,"[48] because the landlords are bound to obey the law. Thus, like the subsidiary in *Copperweld*, they simply have no say in the matter beyond, of course, their say as citizens in advocating the law's repeal.[49]

Permitting a vertical antitrust "conspiracy" to be inferred from the mere fact that landlords are bound by law to obey the

[48] *See, e.g., Monsanto Co.* v. *Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1471 (1984); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

[49] See n.57 *infra*.

rent control ordinance would thus constitute a frontal assault on the very operation of democratic government. Indeed, the only "agreement" such obedience to law could be said to reflect is the social contract itself, under which all who are governed agree to abide by the lawful decisions of the majority. Surely, this is not the sort of "contract" the Sherman Act had in mind.[50]

C. No "Conspiracy" Exists Between City Officials And The Tenants Who Are Protected by the Rent Control Ordinance.

The possibility that the true illegal agreement here is between the city and the tenants who benefit from rent control is nowhere directly suggested in Appellants' Brief. If it is nonetheless considered, it must certainly be rejected.

For to hold that a large and amorphous group of victors in the legislative process could be deemed "co-conspirators" with their government for Sherman Act purposes would trench upon vital First Amendment freedoms of speech, assembly, association and petition — especially in the case of a ballot measure put directly to the city electorate. This Court long ago made clear that the Sherman Act must be read so as to leave maximum breathing space for the legitimate political expression of economic interest groups[51] — a freedom that must extend to consumers as well as producers.[52] The *Noerr/Pennington* doc-

[50] Appellants' effort to characterize the Berkeley ordinance as a vertical price-fixing conspiracy is unavailing for another fundamental reason. The City of Berkeley differs from a manufacturer who fixes resale prices for its goods because the city is not a producer of the rental housing whose prices it regulates. Nor does it have any commercial interest in that housing, or any profit motive to regulate its price. Whereas the very *goal* of resale price maintenance conspiracies is *to restrict competition* among those regulated, Berkeley's rent control program is not directed at competition among landlords in any way; the impact of the program on competition is wholly ancillary to the City's goal of assuring adequate rental housing for its citizens.

[51] *See Eastern Railroad Conference* v. *Noerr Motor Freight*, 365 U.S. at 137-38; *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-71 (1965); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511-12 (1972).

[52] *See, e.g., State of Missouri* v. *National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980); *cf. NAACP* v. *Claiborne Hardware Co.*, 459 U.S. 86 (1982).

trine plainly protects the concerted action by tenants in the legislative campaign that yielded the rent control ordinance. It would be a profound deterrent to the exercise of just such protected expression if a Sherman Act conspiracy between tenants and the city could be found as soon as the tenants' side happened to win.[53]

D. Berkeley's Rent Control Ordinance Has None Of The Special Features That Might Give Rise To A Finding Of A Section 1 Conspiracy Involving City Government.

Nothing in the preceding argument that the City of Berkeley has engaged in no antitrust conspiracy *here* depends on a ruling that cities or their officials can *never* be found to have entered into agreements that violate section 1. To the contrary, an affirmance in this case on the ground that there is no conspiracy in no way precludes courts from finding cities, or their officials, to have conspired with others in wrongful restraint of trade where in fact they have done so. Although a definition of "conspiracy" broad enough to encompass the very enactment and enforcement of the Berkeley rent-control ordinance would reduce city government itself to a series of self-proving section 1 violations,[54] a narrower definition of antitrust conspiracy in

[53] *Noerr* does provide a "sham" exception if the concerted action is a cover for "what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 U.S. at 144. But tenants do not *compete* with landlords, except in the political arena. Tenants could not be said to avail themselves of rent control in order to wreak *competitive injury* on landlords, *cf. California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) (trucking firm invoked administrative process solely to harass competitor), since they have a distinct and obvious *self*-interest in obtaining relief from escalating rents that threaten to price them out of their homes. In any event, appellants have alleged no such exception, nor any facts that might support one. As the court below observed, appellants "do not contend that the ordinance was implemented through misconduct, conflict of interest, or in order to effect discrimination." JSA 35.

[54] As Professor Areeda has aptly noted,

> Superficially, one might characterize any 'meeting of the minds' as a conspiracy. So broad a definition is both meaningless and inconsistent with the Sherman Act, because it is grossly overinclusive for the purposes of antitrust law. When Supreme Court justices, legislators, city council members, or zoning commissioners come to agreement within their respective organizations, there is a meeting of the minds. However, no one would use the language of conspiracy, with its connotations of impropriety, if not criminality, to describe the situation. Nor would one say that a judge, commissioner, or other official who decides in favor of party A rather than party B conspires with A, even if he adopted all of A's arguments.

P. Areeda, *Antitrust Law* 14 (1982 Supp.).

the municipal government context would amply suffice to prevent the subversion of government to private purposes that violate the Sherman Act.

At a minimum, such a definition should encompass those cases in which a government official is the corrupt tool of private interests. Professor Areeda would limit actionable section 1 conspiracy to instances where a city official takes anti-competitive action favoring a private party from whom he has actually taken a bribe, or with whom he shares a specific personal financial interest. P. Areeda, *Antitrust Law* 14-18 (1982 Supp.). "If the conspiracy notion means anything in this context, it can embrace nothing more than corrupt or bad faith decisions." *Id.* at 14.

Beyond such paradigm cases of corruption, there may also be a basis to infer a "conspiracy" to defeat competition in violation of the Sherman Act when, for example, city government, in awarding public contracts, franchises, or other privileges to private parties, prefers one private competitor over another without any cognizable purpose other than rank illicit favoritism. And indeed, allegations of just such favoritism mark virtually every reported section 1 claim against a municipal government that has survived dismissal or summary judgment in the lower federal courts.[55]

[55] *See, e.g., Affiliated Capital Corp.* v. *City of Houston*, 735 F.2d 1555, 1557-59 (5th Cir. 1984) (en banc) (mayor abdicates decision over cable TV franchise to four firms "not based on the merits of their proposals . . . but on the political power of the men behind them," allows the four to "divide the city among themselves," and then requires them to make room for a fifth firm that is controlled by mayor's personal attorney), *cert. pet. filed*, 53 U.S.L.W. 3509 (U.S. Dec. 14, 1984); *Westborough Mall* v. *City of Cape Girardeau*, 693 F.2d 733, 743-45 (8th Cir. 1982) (shopping mall developers alleged that city manager and others conspired with developers of rival mall a mile away to rezone land to block first mall), *cert. denied*, 461 U.S. 945 (1983); *Kurek* v.

Whether the kind of city-citizen conspiracy actionable under section 1 is defined as any grant of such illicit, anticompetitive, private favors in concert with the private beneficiaries, or more narrowly as outright bribery,[56] no such definition can possibly

Pleasure Driveway & Park Dist., 557 F.2d 580, 593 (7th Cir. 1977) (golf pros alleged that municipal park district terminated their golf shop concessions at city golf courses after conspiring with one concessionaire to accept a "sham" bid for a monopoly concession at those golf courses), *vacated and remanded for reconsideration in light of City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 992, *antitrust judgment reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Whitworth* v. *Perkins*, 559 F.2d 378, 379-80 (5th Cir. 1977) (prospective liquor retailer alleged that city council, controlled by owner of largest liquor business in town, had enacted zoning ordinance to exclude him from competing), *vacated and remanded for reconsideration in light of City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 992 (1978), *opinion reinstated*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Campbell* v. *City of Chicago*, 577 F.Supp. 1166, 1169-71, 1179 (N.D. Ill. 1983) (independent taxi drivers alleged that city officials and cab companies conspired to restrict number of taxi licences as part of settlement of damage action by cab companies against city); *Cincinnati Riverfront Coliseum, Inc.* v. *City of Cincinnati*, 556 F.Supp. 664, 667-68 (S.D. Ohio 1983) (coliseum owner alleged that city — which derived revenue in direct proportion to ball game attendance — and baseball team conspired to deny coliseum permission to schedule events competing with ball games); *Schiessle* v. *Stephens*, 525 F.Supp. 763, 776 (N.D. Ill. 1981) (real estate developer alleged that mayor and other officials conspired to take her land — rather than land owned by mayor — by eminent domain for transfer to rival developer); *Guthrie* v. *Genesee County*, 494 F.Supp. 950, 952-53, 958 (W.D.N.Y. 1980) (air charter company alleged that city and airport operating company, which also ran competing air charter service, conspired to freeze plaintiff out of city's airport); *Pinehurst Airlines, Inc.* v. *Resort Air Serv.*, 476 F.Supp. 543, 556 (M.D.N.C. 1979) (airline alleged that county board of commissioners, private airport advisory committee and rival airline conspired to run plaintiff out of business, and that county board had been captured by advisory committee). *See also Community Communications Co.* v. *City of Boulder*, 485 F.Supp. 1035, 1038 (D. Colo. 1980) (cable TV company alleged that City Council conspired with potential rival company to install rival as monopoly), *aff'd*, 455 U.S. 40 (1982).

[56] Even in the absence of allegations of corruption, cities, or their officials, might also be found to have conspired with others in wrongful restraint of trade where the cities were participating in the market like private enterprises. For example, a city that provided a trash collection service might be deemed to have violated Section 1 if it conspired to fix prices with competing private providers of that service. Similarly, if a city operated a cement plant and sold cement to retailers pursuant to contracts requiring resale price maintenance, it might be held to have violated section 1. No such facts are even arguably present here. *Cf. Town of Hallie* v. *City of Eau Claire*, 105 S.Ct. at 1715 (towns alleged city was using its monopoly power over sewage treatment services to gain monopolies in sewage collection and transportation); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. at 392 n.6 (electric utility alleged that city, which produced and sold electricity, conspired with private electrical cooperative to prevent utility's construction of new generating plant, and attempted to monopolize electricity market through tying availability of water and sewage services to purchase of city electrical power).

embrace the rent control ordinance enacted in this case. For that ordinance involves *no private favor whatever*. As the court below correctly observed, "[t]here are no allegations of conflict of interest or illegal collusion in the enactment or drafting of the ordinance." JSA 32. Nor could there be, for all that the tenant "beneficiaries" did in connection with this ordinance was to support it in a fairly contested direct referendum campaign[57] which they won at the polls. Whatever self-interest they expressed there, far from signaling illegitimate collusion with the city, was at the core of our political system. For, as Justice Brennan observed in another context, "We have never insisted that the franchise be exercised without taint of individual benefit; indeed our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare." *Brown* v. *Hartlage*, 456 U.S. 45, 56 (1982).[58] *Cf. Hawaii Housing Authority* v. *Midkiff*, 104 S.Ct. 2321, 2330-31 (1984); *Ruckelshaus* v. *Monsanto Co.*, 104 S.Ct. 2862, 2879-80 (1984). It may well prove challenging for courts, in other section 1 cases, to draw lines between a city's illegitimate conspiracy with private interests and a city's legitimate "summation of . . . individual pursuits," *Brown*, 456 U.S. at 56. But "acknowledging the difficulty of rendering

[57] There can be no doubt that landlords had a full and fair opportunity to seek to influence the vote in that campaign. *See Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1981) (striking down expenditure limit opposed by the landlords). The expenditure limit ultimately struck down in that case was in effect, if at all, only for a brief period following the California Supreme Court's judgment for the City in August of 1980 — long after the campaign which enacted Measure D concluded in June of 1980.

[58] In *Brown*, this Court unanimously held that a state's nullification of a victorious candidate's election, on the ground that his campaign promise to lower his own salary if elected was a bribe for votes in violation of state law, unconstitutionally intruded upon First Amendment interests in robust political debate. 456 U.S. at 61-62.

a concise formulation, or recognizing the possibility of borderline cases, does not disable us from identifying cases far from any troublesome border," as this one is. *Id.*[59]

However Berkeley's rent control ordinance is regarded, in no event does it even remotely resemble the pictures of anticompetitive conspiracies that this Court has drawn in cases of private price-fixing. Accordingly, the judgment below should be affirmed on the ground that the requisite section 1 conspiracy simply does not exist.

II. EVEN IF THE ABSENCE OF A CONSPIRACY WERE NO BAR, THIS CHALLENGE WOULD HAVE TO BE DISMISSED, FOR THE ORDINANCE CANNOT BE HELD AN UNREASONABLE RESTRAINT OF TRADE.

A. The Court Below Correctly Recognized That The Ordinance Cannot Be Condemned Under The Sherman Act Without Considering The Important Public Interests Served.

The Sherman Act condemns only "unreasonable" restraints of trade. *Northwest Wholesale Stationers* v. *Pacific Stationery and Printing Co.*, 105 S.Ct. 2613, 2617 (1985); *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 238 (1918). If the inquiry into the reasonableness of regulatory restraints of trade by city governments is to have any meaning whatever, the regulation's relationship to legitimate public ends must be permitted to justify its anticompetitive effects. Yet the court below is attacked by appellants for allowing the city just such justification. The California Supreme Court declined to reach the conspiracy issue, *see* JSA 15 & n.11, ruling instead that Berkeley's rent control ordinance cannot be deemed to conflict with section 1 of the Sherman Act because, in any event, it does

[59] In *Brown*, this Court likewise found that, whatever a close case might be between an illegitimate private bribe and "those candidate assurances that promote the representative foundation of our political system," candidate Brown's pledge to the voters was not such a case. *Id.* at 56.

not unreasonably restrain trade. Because city governments exist not to make profits but rather to promote the public health, safety, and welfare — goals to which increased competition need bear no special relevance — there must be a "public welfare 'defense'" to cities' alleged violation of the antitrust laws. JSA 28. Accordingly, the court reasoned,

> . . . if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.

JSA 31. Under this standard, it upheld the Berkeley ordinance. JSA 31-33.[60]

If this Court reaches the question of whether Berkeley's rent control ordinance is a reasonable restraint of trade, it must find, as did the court below, that the ordinance's relationship to the city's public welfare justifies any anticompetitive impact it might have. Appellants offer two reasons why such a public welfare defense is supposedly precluded; both are wrong.

Appellants first argue that this Court's decision in *Boulder* precludes any municipal defense to an antitrust challenge other than a demonstration that the city's anticompetitive conduct bears the imprimatur of an express state policy to displace

[60] The state court, following its own precedent, *Birkenfeld* v. *City of Berkeley*, 17 Cal.3d 129 (1976), found the rent control ordinance "reasonably related" to the city's legitimate exercise of its police powers because its stated purpose, and its manifest result, is to alleviate "'the ill effects of the exploitation of a housing shortage by the charging of exorbitant rents to the detriment of the public health and welfare of the city and particularly its underprivileged groups.'" JSA 32. This means-ends relationship was also upheld over a substantive due process challenge to the ordinance *as applied* on August 22, 1985, by Judge Orrick of the United States District Court in San Francisco, in an action brought by a group of Berkeley landlords. *See* n.11 *supra* (Findings of Fact and Conclusions of Law at 14).

competition.[61] The *Boulder* decision in fact did no such thing. *Boulder* did limit cities' enjoyment of the "state action" *exemption* under the doctrine of *Parker* v. *Brown* to those instances in which the city can demonstrate affirmative authorization by the state pursuant to a policy to displace competition with regulation. But *Boulder* did *not* preclude, or purport to preclude, municipal defenses to the alleged underlying antitrust *violation* itself, independent of any "state action" exemption. *See* 455 U.S. at 56-57 n.20; *id.* at 58-60 (Stevens, J., concurring). Put another way, *Boulder* did not relieve antitrust plaintiffs of the burden of proving *both* conspiracy *and* unreasonableness when challenging a city regulation under section 1 of the Sherman Act. Cities remain free to negate both of these elements.

Appellants' second criticism of the public welfare defense is equally lacking in merit. Appellants again confuse the distinct concepts of exemption and violation by suggesting that Congress's failure to *exempt* municipal police power activity when it enacted the Local Government Antitrust Act of 1984 ("LGAA") precludes any court from weighing "public welfare" defenses now.[62] Such an argument, of course, defies the usual axiom that Congress cannot make law by *in*action.[63] But even on its own terms, the argument is baseless here. For the LGAA, which in its final form eliminated antitrust damage liability for official conduct of cities and their officials, embodied Congress' deliberate intent to make "no change in the substantive antitrust law applicable to local governments" in actions for declaratory or injunctive relief. H. Rep. 98-965, 98th Cong., 2d Sess. (1984), at 2. That substantive body of law, of course, was and is shaped almost entirely by the federal courts.[64] As the House Report on the final version of the LGAA noted, "The Committee understands that the substantive law has

[61] Appellants' Brief at 12-13.

[62] *See* Appellants' Brief at 15 & n.10.

[63] *See, e.g., Cleveland* v. *United States*, 329 U.S. 14, 22 (1946) (Rutledge, J., concurring); *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 11 (1942); *Helvering* v. *Hallock*, 309 U.S. 106, 121 (1940) (Frankfurter, J.).

[64] *See, e.g.*, R. Bork, *The Antitrust Paradox* 72 (1978).

changed, and will continue to change, based on court interpretations." H. Rep. 98-965, at 3. Among those "interpretations" will necessarily be the *judicial* construction of the scope of the rule of reason as applied to antitrust challenges against cities. Thus Congress, by enacting the LGAA, did nothing whatever to preclude the course taken by the court below.

Thus the accommodation between antitrust policy and the need for effective local government that is embodied in the test crafted by the court below is not precluded by any law of Congress or any ruling of this Court. And such an accomodation is essential unless this Court is prepared to accept the "grave responsibility" of suppressing "experimentation in things social and economic," *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), to a point well beyond anything portended by *Boulder*. For surely the value of states as laboratories engaged in "novel social and economic experiments," *id.*, would be drastically impaired if the states were always required to conduct such experiments on a state-wide basis unless their cities could show that their public enactments furthered the policy of competition as well as the welfare of the public. The ability of a populous and sprawling state such as California, in particular, to promote the health, safety and welfare of its people would be drastically impaired if cities were required to seek affirmative authorization from the legislature every time they needed to impose rent controls or enact a building code or regulate street vendors or restrict door-to-door solicitation after dark — in short, any time the cities had to pass laws with inevitable incidental impact on economic competition that the cities could justify only by reference to public welfare, and not by reference to their compatibility with federal antitrust policy.[65]

For to restrict a city to "business excuses" or "efficiency gains" as adequate justifications for engaging in anticompetitive

[65] The routine and mechanical application of Sherman Act precedents decided in the context of exclusively private price-fixing conspiracies to such municipal regulation would also entail a massive incursion by the federal courts into the day-to-day exercise of the police power — an intrusion by no means suggested by *Boulder*.

regulation is to condemn the city in advance to lose every antitrust challenge ever brought against it. Business corporations and municipal corporations differ fundamentally in their goals: a business exists to make a profit; a city exists to govern a polity and to promote its welfare. Cities do not, as a rule, regulate prices in order to achieve efficiencies in their "business"; they do so in order to protect their citizens or to redistribute burdens and benefits among them in accord with democratic process.

Appellants' argument would cast a pall of suspicion over a host of mundane municipal measures other than rent control.[66] A locally imposed vaccination requirement for public school students,[67] for example, might well lead a city to prefer for public use an expensive but effective vaccine over a cheaper but less effective serum, where each vaccine is produced by several companies. There can be no doubt that, if the pharmaceutical companies had themselves jointly decided to produce and sell only the more expensive vaccine, there would be a violation of section 1 to which pleas on behalf of public health would constitute no defense. *See Nat'l Society of Professional Engineers* v. *United States*, 435 U.S. 679, 693-96 (1978). But if appellants' arguments were accepted, the local

[66] Few, if any, municipal laws could ever be justified by their enhancement of open-market competition, for the simple reason that governments exist for the very purpose of protecting people from unregulated "markets" of every kind. In the course of fulfilling their legitimate role, cities limit the number of licenses for street vendors in order to keep urban sidewalks passable; they set sanitation standards for restaurants to promote public health; they bar children from convenience stores and poolhalls during school hours in order to deter truancy; they require dancehalls to close at reasonable hours in order to preserve nocturnal peace and quiet; and they restrict the location and concentration of bars and "adult" theaters and bookstores in order to forestall creation of urban "combat zones." All of these measures restrain trade in some way. That all would be suspect if imposed by an agreement of private economic actors should not render them equally suspect when enacted in furtherance of a city's duty to promote the welfare of its people.

[67] Such a requirement is certainly within the sphere of local authority, for "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371, 2378 (1985) (upholding local blood plasma donation regulations over federal preemption challenge).

government requiring exclusive use of the more expensive product would be equally guilty of a section 1 violation.

Surely, this cannot be. Although both actions would eliminate competition between the two products, a decision by the drug companies to sell only the most expensive vaccine would be justifiably suspect as motivated more by profit than by public interest, while in the case of an ordinance enacted by the town, "[w]e may presume, absent a showing to the contrary, that the municipality acts in the public interest." *Town of Hallie*, 105 S.Ct. at 1720. The principle that explains the different results with respect to the city and the private manufacturers — and that underlies both *Town of Hallie* and *Engineers* — is that, when a narrowing of options might be desirable on public welfare grounds, this Court will allow that defense to governments while denying it to private entities precisely because, in matters of public interest, the *government is the appropriate source of action*.[68]

The government is likewise the appropriate body to act when unrestrained market forces threaten the public welfare. As this Court recently observed, Congress, in writing the Sherman Act, "was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices" by those producers who held excessive market power. *Assoc. General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 530 (1983). The Sherman Act was designed as a "'consumer welfare prescription.'" *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979) (*quoting* R. Bork, *The Anti-*

[68] For just this reason, when garment manufacturers sought to combat design piracy by collectively boycotting businesses that traded in unlicensed, copied garments, the defense of a well-intentioned effort to stop the unethical trade practice was rejected. This Court denounced the combination as "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the . . . legislature.'" *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U.S. 457, 465 (1941). The Court was referring in that case to the national legislature, but there is nothing in the opinion to suggest that the Court's point was limited to that context. That public health and welfare regulation, ranging from restaurant sanitation standards to building codes, is within the traditional power of municipalities makes a parallel observation entirely apt in this sort of case.

trust Paradox 66 (1978)). In this respect, the goal of the Berkeley rent control program — protecting tenants from free-market price-gouging during a period of critically tight rental housing — complements, rather than conflicts with, the primary purpose of the Sherman Act.

B. Given The Manifest Relationship Of This Ordinance To Important Public Interests, No Appropriate Rule Of Reason Could Invalidate It.

The ordinance at issue here must be upheld because it would pass muster under *any* rule of reason that takes account of the municipal obligation to promote public welfare — whether the rule fashioned by the court below, or any other that this Court might announce. To begin with, there can be no doubt that Berkeley's rent control ordinance survives the test applied below, since it has a "proper local purpose" and is "rationally" (indeed, substantially) related to a "legitimate" (indeed, important) exercise of the local police power. *See* JSA 31-33. The caveat of the court below that appellants had not shown the City capable of achieving its ends as effectively by means having a "less intrusive impact" on antitrust policies, JSA 31, cannot be read as transforming the state court's test into a vehicle for *strict* judicial scrutiny — judicial scrutiny of a sort that this Court has invoked only for laws that infringe such fundamental rights as the franchise and freedom of speech, or that employ such suspect classifications as race. For no socioeconomic regulation could ever meet such a standard, and such a standard would be entirely inconsistent with the principal language used by the court below — namely, that an ordinance must bear a "rational relationship" to a "legitimate" public purpose, JSA 31.

Indeed, the "less intrusive impact" element of the test applied below must be read in light of the lower court's avowed resort to this Court's Commerce Clause cases as a source of authority. JSA 30-31. In the context of a Commerce Clause challenge to a local health or safety regulation, the search for a less restrictive alternative is actually a test of the availability of a

less *discriminatory* alternative.[69] The test applied below invokes this same anti-discrimination principle by including an express requirement that the challenged ordinance "operate[ ] in an even handed manner." JSA 31. The Commerce Clause requirement that there be no less discriminatory option available to the city is aimed at ferreting out health and safety justifications that, "although rational, [are] merely a pretext for discrimination," *Kassell* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 692 (1981) (Rehnquist, J., joined by the Chief Justice and Stewart, J., dissenting). If the city's proffered purposes "'are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.'"[70]

The judicial suspicion which animates the less discriminatory alternative requirement parallels the reasoning that underlies this Court's refusal to allow private economic actors to justify trade restraints by reference to public welfare:[71] just as business entities might conceal profit motives behind a mask of public safety, so legislatures may be tempted to hide self-serving economic parochialism behind a similar disguise. With respect to Berkeley's rent control ordinance, however, there can be no analogous suspicion. As the court below noted, appellants "do not contend that the ordinance was implemented . . . in order to effect discrimination," nor do they cite any "evidence tending to show that the ordinance fails to regulate . . . in a reasonably evenhanded manner." JSA 35. Since the

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[69] *See, e.g., Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951).

[70] *Kassel*, 450 U.S. at 670 (Powell, J., joined by White, Blackmun and Stevens, JJ.) (quoting *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 449 (1978) (Blackmun, J., concurring)); *see id.* at 681 n.1 (Brennan, J., joined by Marshall, J., concurring); *id.* at 692 n.4 (Rehnquist, J., dissenting). As long ago as *Dean Milk* itself, the Court made clear that the less restrictive alternative test is simply a means of smoking out illegitimate protectionism, because if any "ordinance is valid simply because it professes to be a health measure," the Commerce Clause would impose no limitation on state action "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate." 340 U.S. at 354. *See also Sporhase* v. *Nebraska*, 458 U.S. 941, 956 (1982) ("we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other").

[71] *See, e.g. Nat'l Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), discussed in section II.A. *supra*.

City is not a competitor in the Berkeley rental housing market,[72] it cannot plausibly be accused of furthering a self-interested, hidden agenda of stifling competition. Under the suitably deferential standard employed below, the ordinance cannot be found wanting.[73]

Even if this Court were to embrace a tougher, intermediate standard of scrutiny of municipal regulation challenged under the Sherman Act, appellants could not plausibly contend that the ordinance would fail to meet it. For rent control — even if one deems it unwise — surely bears a substantial relationship to the important government interests of halting price-gouging, preserving community diversity, and assuring adequate housing for minorities, the poor, the disabled and the aged. *See* Statement of the Case *supra*; JSA 32, 111.

But the ability of the particular ordinance at issue here to survive heightened scrutiny should not encourage the adoption of any test more exacting than the one used below. For as this Court recently counseled, "[e]ven assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all." *City of Cleburne* v. *Cleburne Living Center*, 105 S.Ct. 3249, 3257 (1985).

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[72] *See* n.15 *supra*.

[73] Under the Sherman Act, as under the Commerce Clause, there is ample reason to defer to government regulation whenever its stated rationale is neither illusory nor a pretext for illicit motives such as discrimination. *Cf. Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 459, 463 n.7, 471 n.15, 473-74 (1981). The mere fact that some economic actors are incidentally burdened more than others is insufficient to invalidate an ordinance. *Id.* at 474; *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127-28 (1978). Even when reviewing an ordinance under the Privileges and Immunities Clause of Article IV — which requires more demanding scrutiny than does the Commerce Clause — the less discriminatory alternative test for illegitimate purposes, *see, e.g., Supreme Court of New Hampshire* v. *Piper*, 105 S.Ct. 1272, 1279 & nn. 17 & 18 (1985) (suggesting that state refusal to admit non-residents to its bar may have been designed to protect local lawyers from competition); *Toomer* v. *Witsell*, 334 U.S. 385, 398-99 (1948), is applied "'with due regard for the principle that [governments] should have considerable leeway in analyzing local evils and in prescribing appropriate cures.'" *United Bldg. & Constr. Trades Council* v. *City of Camden*, 104 S.Ct. 1020, 1030 (1984) (citation omitted).

C. Regardless Of The Standard Employed, The Ordinance Cannot Be Invalidated *On Its Face* Until Judicial Experience Warrants The Creation Of A New *Per Se* Rule.

Even if this Court were to adopt for future use a non-deferential standard of reasonableness for particular applications of local laws challenged under the Sherman Act, the question of the law's *facial* validity under such a test — all that is at issue in this case — is utterly premature. As the court below rightly held, the rule of *per se* illegality normally applied to private price-fixing conspiracies cannot be applied to a price control measure imposed by a local government, for no legacy of judicial experience with such claims yet warrants a conclusion that such regulation "necessarily produces negative net anti-competitive effects or that it lacks 'any redeeming virtue.'" JSA 22.

In the *absence* of a finding that the Berkeley rent control ordinance is subject to a rule of *per se* invalidity, the ordinance simply may not be condemned on its face, and the judgment below must therefore be affirmed. For, as this Court stated in *Rice* v. *Norman Williams Co.*, a statute, "when considered in the abstract," may be invalidated under section 1 only "when the conduct contemplated by the statute is in all cases a *per se* violation"; "[i]f the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract." 458 U.S. at 661. This is so because the rule of reason would necessitate a factual record about the *actual operation* of the law *in particular instances* — a factual record that must, of course, be absent in any facial challenge to the law as such: "Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is *facially* inconsistent with federal antitrust laws." *Id.* (emphasis added). The inapplicability of the *per se* rule against private price-fixing to the public ordinance at issue here, and the unavailability of any other *per se* rule of invalidity, are thus grounds in themselves for affirming the judgment below.

The California Supreme Court's conclusion that no *per se* rule is appropriate in this case is unassailable. *Per se* rules in the context of section 1 of the Sherman Act "permit categorical judgments with respect to certain business practices that *have proved to be* predominantly anticompetitive." *Northwest Wholesale Stationers* v. *Pacific Stationery and Printing Co.*, 105 S.Ct. 2613, 2617 (1985) (emphasis added). These rules of automatic illegality are thus merely judicial short-cuts for determining whether anticompetitive agreements effect *unreasonable* restraints of trade — short-cuts that are possible only after the accumulation of a wealth of judicial experience in reviewing a given practice under the rule of reason in individual cases on particular factual records. Conduct as to which such experience is lacking may not be placed into this category on the mere basis of superficial resemblance to conduct already within it.[74]

Appellants' pleas for *per se* invalidation of Berkeley's rent control ordinance, solely on the basis of its superficial resemblance to private actions taken for the purpose of "raising, depressing, fixing, pegging or stabilizing" prices,[75] must therefore be rejected. The judicial formulation of new *per se* rules cannot rest on facile analogies; yet appellants blithely gloss over the fact that this Court's "[un]waver[ing] . . . enforcement of the *per se* rule against price fixing," *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 347 (1982), has occurred exclusively in the context of private industries, not public regulation.[76] To impose a per se rule against municipal

[74] *Northwest Stationers*, 105 S.Ct. at 2620-21 (holding that joint expulsion of member from purchasing cooperative, although describable as a concerted refusal to deal, was not the kind of concerted refusal to deal warranting *per se* invalidation); *see also National Collegiate Athletic Ass'n* v. *Board of Regents*, 104 S.Ct. 2948, 2961-62 (1984).

[75] Appellants' Brief at 18-19 (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)).

[76] This Court has rejected claims on the part of members of some private industries that special characteristics of their industry entitled their agreements to fix prices to immunity from *per se* invalidation. *See Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 349-51; *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 695-96 (1978). But in so doing, the Court has stressed that this reflects simply the principle that the *per se* rule

price regulation is therefore to impose a *new per se* rule altogether. And because it is "established . . . that a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged," *id.* at 349 n.19 (citing *White Motor Co.* v. *United States*, 372 U.S. 253 (1963)) — experience utterly lacking in the case of municipal rent control — no such *per se* rule could yet be available to invalidate the ordinance at issue here. Accordingly, pursuant to the principle announced in *Rice*, the judgment below must be affirmed.

III. EVEN IF THIS COURT WERE TO VIEW THE ORDINANCE AS OTHERWISE A SHERMAN ACT VIOLATION, MUNICIPAL RENT CONTROL IN CALIFORNIA IS SO PLAINLY CONTEMPLATED BY STATE LEGISLATION ESTABLISHING LOCAL RESPONSIBILITY FOR HOUSING THAT THE ORDINANCE IS NONETHELESS EXEMPT FROM THE SHERMAN ACT'S REACH.

Although the court below did not reach the issue, there is no dispute in this case as to what California law provides on the subject of municipal rent control. The only question, if the Berkeley ordinance would otherwise offend the Sherman Act, is whether that state law meets the federal test laid down by this Court in *City of Boulder* and *Town of Hallie* for the "state action" exemption of *Parker* v. *Brown*. This Court's precedents do not require a state legislature "to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effect." *Town of Hallie*, 105 S.Ct. at 1718. It is sufficient if "[s]uch conduct is a foreseeable result of empowering" the city with "broad authority to regulate" in a particular

against price-fixing cannot "be rejustified for every [different] *industry*." *Maricopa County*, 457 U.S. at 351 (emphasis added). This principle has no application to price regulation by a city, for running a city is not just another "industry." *See* section II.A. *supra*.

field, *id.*[77] California law meets this standard in two ways: first, by virtue of express state ratification of rent control in Berkeley; and second, by imposing on Berkeley a duty to assure housing for its residents while simultaneously reserving to the City the power of rent control as a means of fulfilling that obligation.

Berkeley's original rent control initiative was enacted by the electorate in the form of an amendment to the City charter. That rent control measure was expressly ratified by concurrent resolution of both houses of the California Legislature on August 2, 1972.[78] Moreover, in its *Birkenfeld* decision in 1976, the California Supreme Court expressly upheld local authority to impose rent control, ruling that the California "Constitution *itself* confers upon all cities and counties [a] power . . . as broad as the police power exercisable by the Legislature itself," 17 Cal.3d at 140 (emphasis added).[79] The court went on to conclude unanimously that the municipal rent control program before it was, in its essential features, clearly within the City's

[77] There is no requirement of active state supervision, because Berkeley is a city. Appellants repeatedly misconstrue footnote 10 of *Town of Hallie*, *see, e.g.*, Appellants' Brief at 13, 33 n.16, 37, by reading it without regard to *Southern Motor Carriers Rate Conference* v. *United States*, 105 S.Ct. 1721 (1985), on which the Court expressly relied in footnote 10. Active state supervision was required in *Southern Motor Carriers* because the state had delegated substantial power to a combination of private competitors to propose and effectively fix prices for common carriers. *See* 105 S.Ct. at 1723-24, 1727. In the case at hand, the City's Rent Stabilization Board sets, surveys, adjusts and enforces rental prices *itself* — it does not delegate to landlords any power to collectively propose rents. *See* section I.A. *supra*. Since the price-setting "actor is a municipality," *Town of Hallie*, 105 S.Ct. at 1720, and not a private combination, "the second prong of the *Midcal* test is inapplicable," *Southern Motor Carriers*, 105 S.Ct. at 1727 n.20.

[78] *Birkenfeld*, 17 Cal.3d at 137 & n.2. At that time, Article XI, Section 3 of the California Constitution required that all city charter amendments be approved by concurrent resolution of both houses. This requirement was repealed by constitutional amendment in 1974. *Id.*

[79] Of course, any municipal exercise of such constitutional power is subject to displacement by the state legislature, which may enact general state law preempting contrary laws by municipalities. *See Birkenfeld*, 17 Cal.3d at 141. But California has plainly chosen, to date, *not* to enact any law preempting rent control. Given this potential state preemptive power, it can make no sense to argue, as does one *amicus*, *see* Brief of the Coalition for Competition at 23, that the decision below somehow threatens the state legislature's sovereign prerogative of banning local rent control should it ever decide to do so.

police power, *id.* at 158-60, as a "debatabl[y] . . . reasonable means of counteracting harms and dangers to the public health and welfare emanating from a housing shortage," *id.* at 161.[80]

The ordinance at issue in this case is the direct descendant of the 1972 rent control measure, and was in fact drafted specifically to correct the procedural defects of that original initiative. *See* JSA 50. In 1980, four years after the state supreme court upheld municipal rent control in *Birkenfeld*, and eight years after the California Legislature specifically ratified Berkeley's initial rent control ordinance, the Legislature provided in Section 65589(b) of the Cal. Govt. Code that nothing in the state's new comprehensive housing legislation should be construed as "a repeal of any authority which may exist of a local government to impose rent controls . . .."[81] In these circumstances, "it is clear that anticompetitive effects logically would result," *Town of Hallie*, 105 S.Ct. at 1718, from the power that the Legislature reserved to Berkeley in the field of rent control. Since the Legislature itself had *ratified*[82] Berkeley's earlier rent control initiative, it is beyond

[80] All of the efforts of appellants and their various *amici* to attack the wisdom of rent control, or to find in various actions of the State of California a policy hostile to municipal adoption of rent control, are rendered entirely immaterial by *Birkenfeld*.

[81] Section 65589(b) also provided that the statute should not be construed as a "grant" of *new* local "authority . . . to impose rent controls." Such a grant is unnecessary to Berkeley's argument here, for it is unnecessary to Berkeley's power to regulate rents — a power that, as the court held in *Birkenfeld*, flows directly from the state constitution. Section 65589(b) confirms that the Legislature was well aware in 1980 that cities already possessed rent control authority, and that it wished to preserve that power for them. Further evidence of the Legislature's affirmative awareness of that pre-existing local power can be found in the few enumerated, state-supervised housing programs that have specifically been *exempted* from local rent control. *See* Cal. Health & Safety Code Sections 1518(b), 50008(b), and 51852.5(a).

[82] Although such ratification by concurrent resolution does not repeal inconsistent general legislation for the purposes of California's *state* preemption doctrine, *see Birkenfeld*, 17 Cal.3d at 141 n.10; *Eastlick* v. *City of Los Angeles*, 29 Cal.2d 661, 665, 177 P.2d 558 (1947), it certainly suffices to cloak the municipal enactment in the aegis of state authority for *federal* preemption analysis, since such ratification has, under California law, "all the essence of a plain legislative enactment," *Taylor* v. *Cole*, 201 Cal. 327, 334, 257 P. 40 (1927); *Birkenfeld*, 17 Cal.3d at 141 n.10.

cavil that the same city's subsequent re-implementation of an essentially identical rent control program was "foreseeable."

Even if the foregoing record did not establish Berkeley's authority to impose rent control, a review of California's comprehensive housing legislation leaves no room for doubt. As this Court noted in *Town of Hallie*, "[t]he only real danger is that [a city] will seek to further purely parochial public interests at the expense of more overriding state goals." 105 S.Ct. at 1721. There is no such threat in the instant case, because Berkeley's goal of assuring a home in the City for "low and fixed income persons, minorities, students, [the] handicapped, and the aged,"[83] tracks perfectly the goals of the state. The California Legislature specifically provided in Cal. Govt. Code Section 65580 that "[l]ocal and state governments have a responsibility to use the powers vested in them . . . to make adequate provision for the housing needs of all economic segments of the community."[84] And Section 65581 in turn leaves it to each locality to "determin[e] what efforts are required by it to contribute to the attainment of [this] state housing goal."[85] The ordinance on its face states its self-conscious purpose as a means of "compliance with [the City's] legal obligations relating to the rental of housing."[86]

Appellants would paint this legislative framework as an expression of mere neutrality by the state legislature on the question whether California cities may adopt rent control measures such as Berkeley's.[87] But this statutory scheme is hardly "neutral": it *mandates* that cities take necessary steps to ensure that all their residents are housed. All it leaves to the discretion

[83] This goal is stated in the ordinance itself. JSA 111.

[84] *See also* Cal. Govt. Code Section 65302(c) (requiring that each city's obligatory development plan include "a housing element"); Section 65583 (mandating that this "housing element . . . *shall* make adequate provision for the existing and projected needs of all economic segments of the community") (emphasis added).

[85] *See also* Cal. Govt. Code Section 65300.7.

[86] Section B. (3) "Purpose," JSA 111. *See also* Section B. (2), JSA 109 (making specific reference to the "Housing Element of the Berkeley Master Plan").

[87] *See* Appellants' Brief at 34-35.

of the cities themselves is the choice of *means* for doing so — on the basis of an express state legislative finding that "each locality is best capable of determining what efforts are required," Cal. Govt. Code Section 65581(c). Any means that is rationally calculated to discharge a municipality's state-imposed obligation to meet the housing needs of all its residents — so long as that means has been preserved for cities by the legislature — is surely "a foreseeable result" of imposing that obligation.[88] And rent control is precisely one such means, as the Supreme Court of California expressly held in *Birkenfeld*.[89]

The fact that California has not commanded the choice of this means is immaterial. A municipality need not show that the state "'compelled' it to act" as it did in order to establish that its conduct was taken pursuant to a "'clearly articulated and affirmatively expressed' state policy to displace competition with regulation." *Town of Hallie*, 105 S.Ct. at 1719, 1720. In this regard appellants,[90] like the plaintiffs in *Town of Hallie*, have misapprehended the standard formulated by this Court in *Boulder*. In *Town of Hallie* the Court rejected the argument that Wisconsin's statutes are "neutral because they leave the City free to pursue either anticompetitive conduct or free-market competition." 105 S.Ct. at 1718. Similarly, the fact that California law leaves a municipality free either to pursue the challenged regulatory policy — or to reject it, but *only* in favor of some other means of achieving the state-man-

[88] *See City of Lafayette*, 435 U.S. at 415 ("an adequate state mandate for anticompetitive activities of cities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'").

[89] It is this *combination* of state-imposed duty and state-created power that prevents California from being accurately characterized as indifferent to whether a city imposes rent control. Although the *power* to impose rent control ultimately derives from the California Constitution, this case is easily distinguished from *Boulder* because the *duty* to use that means in fulfilling state-mandated housing goals, or others to like effect if rent control is rejected, derives from express legislation. In *Boulder*, by contrast, neither the Colorado Home Rule Amendment nor any other state legislation addressed the regulation of cable TV, whether by obligating cities to meet their residents' electronic communications needs or otherwise. *See Town of Hallie*, 105 S.Ct. at 1718-19 (discussing *Boulder*).

[90] *See* Appellants' Brief at 34-35.

dated goal — cannot prevent the municipality from tracing its regulatory action to the state.[91]

In its *Boulder* opinion, this Court rejected the dissenting view that its decision would "impede, if not paralyze local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety and welfare." 455 U.S. at 60 (Rehnquist, J., joined by Burger, C.J., and O'Connor, J., dissenting). Whichever side may have been right in that dispute over the impact of the *Boulder* decision on its own facts, there can be little doubt that extending the Sherman Act's prohibitions to regulations that a city chooses to enact in discharging a duty imposed upon it by the state legislature would represent a gross intrusion of Congress's power into the most basic structures of state-local relations. For it is undisputed that the Sherman Act permits a state to confer upon its municipalities complete exemption from the preemptive effect of federal antitrust law insofar as the state is prepared to tie the hands of local government in the selection of means to a state-mandated end. Can it be that the Sherman Act nonetheless leaves cities subject to federal antitrust restrictions whenever the state chooses instead to specify *ends* while leaving localities free to choose the means? Such a construction would stultify state socioeconomic experimentation by transforming the Sherman Act into a novel restriction indeed upon the way in which a state chooses to distribute power between itself and its local governing bodies.[92] The fact that Congress might, after *Garcia*

[91] *See, e.g., Central Iowa Refuse System* v. *Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 426-27 (8th Cir. 1983) (state statute leaving municipalities "with a range of options concerning how best to provide for sanitary disposal facilities" held to constitute sufficient authorization, and not mere indifference, notwithstanding the statute's silence on the particular means of disposal chosen by the city), *cert. denied*, 105 S.Ct. 1864 (1985).

[92] Appellants are grossly mistaken in their assumption, Appellants' Brief at 41 n.20, that all cities outside California imposing rent control do so pursuant to a specific state rent control statute. The New Jersey statutes appellants cite, *id.*, authorize rent regulation only for substandard units, and do not in fact constitute general rent control enabling legislation. As the New Jersey Supreme Court noted in *Inganamort* v. *Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973), that state "has no statute dealing with rent control and hence rent control is not preempted by any such measure." 303 A.2d at 307. The court held that New Jersey cities could enact rent controls pursuant to their home rule

v. *San Antonio Metro. Transit Authority*, 105 S.Ct. 1005 (1985), have the power to achieve this extreme result by a clear statement of intent to do so cannot obscure the radical import of a judicial decision in the mid-1980s attributing to the Congress of 1890 any such far-reaching and intrusive purpose.

CONCLUSION

Chief Justice Hughes once cautioned that, when applying the antitrust laws, "[r]ealities must dominate the judgment." *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933). The pivotal reality in this case is that a local government's rent control program, democratically enacted to promote public welfare, is not the same thing as a private price-fixing conspiracy. Appellants ignore this fundamental reality and seek to have the matter both ways. On the one hand they would equate cities with private economic actors to condemn public price regulation as the mere equivalent of a private price-fixing conspiracy. On the other, striving to expose cities to a withering preemption doctrine this Court has never endorsed, they would deny cities the freedom private corporations enjoy to conduct their affairs as they choose, so long as they do not actually violate the Sherman Act.

The thoroughness with which appellants' antitrust theory would whipsaw *all* municipal governments obscures a result in this particular context that is no less disturbing. The Sherman

power, 303 A.2d at 301, as part of the state policy of "permit[ting] each municipality to act or not to act or to act in a way it believes will best meet the local need," *id.* at 302. One-and-a-half million homes — half of the rent controlled units in the nation — are in New Jersey and California, *see* n.2 *supra*, and are thus regulated by cities in the absence of what appellants call a "specific state mandate," Appellants' Brief at 41 n.20. If cities in several other states should choose to re-enact rent control, they would likewise do so pursuant to their own broad police powers. *See, e.g., Warren* v. *City of Philadelphia*, 115 A.2d 218, 220-21 (Pa. 1955) (rent control power derived from state Home Rule Act); *Heubeck* v. *City of Baltimore*, 107 A.2d 99, 101, 102 (Md. Ct. of Appeals 1954) (derived from Home Rule Amendment).

Act is, in essence, a governmental effort to protect consumers from the predations of producers possessed of inordinate market power. It would be ironic indeed if this statutory shield against economic exploitation could be wielded as a sword to dismember a local government's effort to protect its citizens — and the city itself — from the ill effects of just such exploitation during a housing crisis. For all of the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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NO. 84-1538

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vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

On Appeal from the Supreme Court of the State of California

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. THE BERKELEY RENT STABILIZATION ORDINANCE CONFLICTS WITH AND IS PREEMPTED BY § 1 OF THE SHERMAN ACT WHICH MANDATES PRICE COMPETITION AMONG PRIVATE COMPETITORS	4
A. The Sherman Act's Prohibition Against Price Tampering Applies To The Fixing Of Maximum As Well As Minimum Price	4
B. Non-Immune Municipal Price Stabilization Programs Are Preempted By The Sherman Act	6
1. The Berkeley Ordinance Stands As An Obstacle To The Accomplishment Of The Full Objectives Of The Sherman Act	7
2. The Ordinance Places Irresistible Pressure On Private Property Owners To Stabilize Their Rental Prices	8
C. Appellees' Plea For A "Public Welfare" Defense Has Been Rejected By Congress	13
III. THE BERKELEY ORDINANCE IS NOT AUTHORIZED BY A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE LAW. IT THEREFORE IS NOT EXEMPT NOR IMMUNE FROM THE COVERAGE OF FEDERAL ANTITRUST LAWS	15
IV. CONCLUSION	20

TABLE OF AUTHORITIES

CASES — PAGE(S)

Albrecht v. *Herald Co.*, 390 U.S. 145 (1968) 4, 5, 10
Arizona v. *Maricopa County Med. Soc'y.*, 457 U.S. 332 (1982) 4, 5, 13
Birkenfeld v. *City of Berkeley*, 17 Cal.3d 129, 550 P.2d 100, 130 Cal.Rptr. 465 (1976) 16
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 7, 9, 10, 11
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) 20
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 2, 6, 7, 8, 14, 17, 20
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982) 6, 7, 8, 14, 19
Fashion Originators Guild v. *FTC*, 312 U.S. 457 (1941) 10
Golden State Transit Corp. v. *City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984), cert. denied, ____U.S.____, 105 S.Ct. 1865 (1985), after remand, 754 F.2d 830 (9th Cir. 1985), cert. granted, ____U.S.____, 105 S.Ct. 3475 (1985) 11, 16
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 7
Keifer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) 4
McClain v. *Real Estate Board*, 444 U.S. 232 (1980) .....
Nash v. *Florida Industrial Comm.*, 389 U.S. 235 (1980) 15
(1967) 7
Northern Pacific Ry. Co. v. *United States*, 356 U.S. 1 (1958) 10
Parker v. *Brown*, 317 U.S. 341 (1983) 9
Perez v. *Campbell*, 402 U.S. 637 (1971) 7
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 7
Rice v. *Norman Williams Co.*, 458 U.S. 654 (1982) 8, 9
Russell v. *United States*, ____U.S.____, 105 S.Ct. 2455 (1985) .. 15
Santa Monica Pines, Ltd. v. *Rent Control Board*, 35 Cal.3d 858, 679 P.2d 27, 201 Cal.Rptr. 593 (1984) 19
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (151) 11
Springs Ambulance Service, Inc. v. *City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984) 16
Town of Hallie v. *City of Eau Claire*, ____U.S.____, 105 S.Ct. 1713 (1985) 15, 17
United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) 10
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 4

CONSTITUTIONS — PAGE(S)

United States Constitution, art. VI 7
California Constitution, art. XI, § 3 16

STATUTES AND BILLS

15 U.S.C.
§ 1 ..... *passim*
§ 2 9
§ 35 ..... 3, 14
Cal. Govt. Code
§ 65580 ..... 17, 18, 19
§ 65589 17
Cal. Health & Safety Code
§ 50001 ..... 7, 15, 18, 19
§ 50200 19
§ 50202 ..... 7, 18
H.R. Rep. No. 5992, § 3, 98th Cong., 2d Sess. (1984) 3
H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 13 (1984) 3, 14
Cal. Assembly Bill 3788 (Campbell 1976) 17
Staff Analysis, California State Local Government Comm., Assembly Constitutional Amendment 81 (Miller) (Amended May 1, 1974) 16
Elmwood Commercial Rent Stabilization and Eviction Protection Ordinance, Berkeley, California, Ordinance 5468-N.S. (June 8, 1982) 6

AUTHORITIES

L. Tribe, American Constitutional Law, § 6-24 (1978) 8

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I. INTRODUCTION

At issue in this case is whether the price-fixing activities of a municipal agency, acting without any affirmatively expressed state authorization, are preempted because of direct interference with the Sherman Act's mandate for price competition in the marketplace.

Any evaluation of this case must necessarily begin with the recognition that we are dealing with a purely local ordinance; appellees seek to downplay this fact by their continued and repeated citation to and reliance on cases which involve challenges to state, not municipal law. This is a crucial distinction

and one which appellees refuse to recognize in advocating a blanket municipal "public welfare" exemption from the antitrust laws. Without saying so directly, appellees argue that there is no difference whatsoever under the Sherman Act between the decision of a local government to fix prices and a similar decision by a sovereign state. This untenable argument has been rejected not only by this Court, but also by recent Congressional action, and cannot be seriously considered.

The central question presented by this appeal is whether this nation's economy is to be controlled by Congress or by the thousands of local governmental units across the nation. Appellees argue that local governmental units may, at will, override the Sherman Act's mandate of free price competition in order to serve local parochial interests. Despite the fact that this Court has repeatedly stated that price competition is the "central nervous system of the economy," nowhere do appellees even mention the serious and far-reaching economic implications of unauthorized local price-fixing laws; nor do they set any limits or parameters on the power they would give cities to abrogate price competition. Thus, under appellees' theory, economic choices counseled solely by the parochial interests of local governments could be made without regard to their economic and anticompetitive effects. This Court has condemned just that result. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (hereinafter "*Lafayette*").

Berkeley attempts to bolster this entirely unreasonable argument by invoking populist rubric to support the proposition that its price-fixing ordinance should be insulated from judicial scrutiny because it is a "pro-consumer" law passed by popular vote. This argument proves too much: it takes little imagination to understand that any initiative that transfers wealth from a minority to a majority of the population will command strong electoral support. However, this does not confer any additional protection to appellees' Rent Stabilization and Eviction for Good Cause Ordinance (hereinafter, the "Ordinance"). Moreover, such price controls and fixing of maximum prices are not "pro-consumer" measures, as evidenced in the universal condemnation of rent control by virtually all economists who have studied its long-term effects (see Appellants' brief, at 26-28).

Nor is there any guarantee that future local pricing-fixing will be "pro-consumer." Moreover, Congress has already determined that the free market is ultimately in the best interest of the consumers of this nation, and that decision is supreme over appellees' asserted claims.

Indeed, appellee's argument in favor of blanket municipal price-regulation cannot be squared with Congressional action in passing the Local Government Antitrust Act of 1984, 15 U.S.C. § 35 ("LGAA"). Responding to concerns voiced by members of this Court, Congress exempted cities from monetary damages in antitrust actions. However, Congress simultaneously reaffirmed its supremacy over municipal control of the economy, by rejecting bills which would have immunized local actions undertaken to promote "the public health, safety and welfare." H.R. Rep. No. 5992, § 3, 98th Cong., 2d Sess. (1984). Congress elected not to exclude local governments from the application of the antitrust laws (H.R. Report No. 98-965, 98th Cong., 2d Sess. 13 (1984)), which is precisely what appellees ask this Court to do.

The Berkeley price-fixing law is purely a local creation and not the product of a clearly articulated and affirmatively expressed state policy. Nor is it narrowly drawn to promote low and moderate income housing pursuant to the local interest proferred by appellees, as it controls the rent of all Berkeley rental housing including luxury units. In the final analysis, the Ordinance is an unauthorized and purely local attempt to fix the price of 23,000 rental units and directly control price competition in an industry which is vital to the flow of interstate commerce and the functioning of the nation's economy, by placing irresistible pressure—the threat of criminal prosecution—upon appellants to deter them from engaging in price competition.

II. THE BERKELEY RENT STABILIZATION ORDINANCE CONFLICTS WITH AND IS PREEMPTED BY § 1 OF THE SHERMAN ACT WHICH MANDATES PRICE COMPETITION AMONG PRIVATE COMPETITORS.

A. The Sherman Act's Prohibition Against Price Tampering Applies To The Fixing Of Maximum As Well As Minimum Price.

This Court has consistently ruled that Section 1 of the Sherman Act (15 U.S.C. § 1) mandates price competition in the private sector. Prices are to be established by competitive market forces, and any program which has the purpose or effect of ". . . raising, depressing, fixing, pegging or stabilizing . . ." prices is illegal per se and in direct and facial conflict with Section 1. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, (1940); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982).

Appellees do not deny that the Ordinance interferes with, and indeed, criminalizes price competition among private owners of the 23,000 rental units in Berkeley. Instead, they attempt to justify the Ordinance as one which set maximum prices (Appellees' brief, at 3), leaving property owners free to lower rents, which, they argue, is more consistent with the pro-consumer policies of the Sherman Act.[1]

This same simplistic argument has been consistently rejected by the Court. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Albrecht v. Herald Co.*, 390 U.S. 145, 152-153 (1968); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 342-348 (1982).

Maricopa is especially relevant here. In that case, the Court recognized that in price-stabilization schemes, the established maximum price becomes the fixed price. 457 U.S. at 347. Further, the evil of any price stabilization program is that it substitutes the subjective, parochial and perhaps erroneous

[1] Appellees contend that landowners are "free to compete" by "lowering rents, improving services and making improvements to their units" (Appellees' brief, at 3). This argument underscores the fallacy of appellees' reasoning: how does one pay for such "improvements" while simultaneously "lowering rents"?

judgment of the entity setting the price ceiling (in our case, the City of Berkeley) for the forces of the competitive market in determining the reasonableness of prices:

> Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay.

Maricopa, 457 U.S. at 347, quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 152-153 (1968)).

In *Maricopa*, Justice Stevens reaffirmed for the Court that a price stabilization program cannot escape per se condemnation because it limits maximum price, recognizing that the per se rule is grounded on our national and federal legislative commitment to price competition as a market force, and not on a policy of low selling prices at the expense of eliminating competition. 457 U.S. at 348. The same considerations which have prompted this Court's uniform condemnation of maximum price setting are applicable to the Berkeley law here at issue. Price competition among private lessors, and the setting of prices by free market forces in Berkeley—the primary federal legislative mandates under the Sherman Act—are directly prohibited. Berkeley substitutes "its perhaps erroneous judgment . . . for the forces of the competitive market." *Id.* at 347 (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 152-153 (1968)). Maximum rental rates bureaucratically set by the Berkeley Rent Board may be fixed too low to encourage new construction of rental units[2] or to enable current property owners to furnish services and convenience which the tenants desire and which enhance the value of the property for the tenants. Berkeley has rejected the federal mandate and the

[2] Appellees argue that the Ordinance does not discourage new construction because such units are exempt from rent controls (Appellees' brief, at 4). However, investors are understandably reluctant to rely on such exemptions since Berkeley has in the past arbitrarily abolished them, thereby removing their "protection" retroactively. For example, when the Ordinance was adopted in June 1980, it exempted property of four units or less where one unit was occupied by the owner. In 1982, this exemption was abolished, and "previously exempt" units were subjected to the onerous effects of the law. See Ordinance, § 5f (J.S. App. at A-114); § 10c (J.S. App. at 123).

enduring economic value of price competition in favor of pursuing a parochial and temporary interest for lower prices.

B. Non-Immune Municipal Price Stabilization Programs Are Preempted By The Sherman Act.

Appellees next argue that the universally accepted rule that price stabilization schemes are prohibited by the Sherman Act must not be applied to cities. According to this argument, cities must be afforded some vague type of "public welfare defense" so they can pursue ". . . experimentation in things social and economic." (Appellees' brief, at 24-25, 27.) Appellees warn that invalidation of the Ordinance "would cast a pall of suspicion over a host of mundane municipal measures other than rent control." (Appellees' brief, at 28.)

These expressions of fear are completely out of place. It would, indeed, be a radical departure from fundamental constitutional principles applicable to the Supremacy Clause to disregard the federal legislative mandate that prices be established by competition and market forces and adopt appellees' view that local governments are free to establish their own pricing systems any time they are deemed to be in the local interest. Under appellees' theory not only can the City of Berkeley fix the price of rents; it could also prohibit price competition and set prices for an unlimited variety of other products or services including commercial rents,[3] newspapers, food, clothing, pharmaceutical and medical supplies, hospital rates, even automobiles and television sets. Thus a city, without any state authorization whatsoever, could declare its independence from the Sherman Act's mandate of price competition, all in pursuit of local parochial interests or "experimentation." *Cf. Lafayette,* 435 U.S. at 408; *Community Communications Co. v. City of Boulder,* 455 U.S. 40, 50-51 (1982).

[3] Indeed, recently Berkeley has enacted measures to control commercial rental rates. Elmwood Commercial Rent Stabilization and Eviction Protection Ordinance, Berkeley, California Ordinance, 5468-N.S. (June 8, 1982).

Under our system of federalism, the freedom of state and local governments to experiment in finding legislative solutions to current problems ends when their regulations run contrary to supervening federal legislation.[4] Current federal legislation preserves the power to "experiment" with regulatory displacement of competition to state governments, while *denying* such policymaking discretion to cities acting *sua sponte.* Under any analytical approach to the doctrine of preemption, the Berkeley ordinance is in direct and facial conflict with the price competition mandate of Section 1 of the Sherman Act and must be invalidated under the Supremacy Clause. U.S. Const., art. VI.

1. The Berkeley Ordinance Stands As An Obstacle To The Accomplishment Of The Full Objectives Of The Sherman Act.

Under the traditional approach to Supremacy Clause and/or preemption issues, this Court has never hesitated to invalidate state or local regulations which stand as an obstacle to the accomplishment and execution of the full purposes and objectives of federal legislation. Local policies must give way to supervening federal legislative judgments. *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978). Numerous state and local laws, even though not in direct or irresistible conflict with federal statutes, have been invalidated because they undermined objectives which Congress sought to achieve through its legislation. *See, e.g., Perez v. Campbell,* 402 U.S. 637 (1971); *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977); *Nash v. Florida Industrial Comm.,* 389 U.S. 235 (1967).

Local deviations from federal antitrust policy are no exception. *Lafayette, supra; Boulder, supra,; California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980). Municipalities may not enact regulations which conflict with federal antitrust laws unless such are pursuant to a "clearly articulated and affirmatively expressed" policy of the

[4] As will be shown more fully in Argument II below, this is especially true with respect to the housing market in California, where the State Legislature has declared that a "healthy housing market" depends on the interplay of "free marketplace" forces. Health & Safety Code, §§ 50001, 50202, *et seq.*

state legislature. *Lafayette*, 435 U.S. at 410-413; *Boulder*, 455 U.S. at 51-55. As will be shown in II, below, the Berkeley rent control ordinance is not authorized by state law; it must be viewed, therefore, as nothing more than a non-immune local ordinance which facially conflicts with supervening federal legislation.

There can be little doubt that the Sherman Act mandates price competition as a national economic policy and that the ordinance at issue here prohibits price competition, thereby standing as an obstacle to federal policy. Appellees urge the Court to ignore or reject this clear line of authority and instead rule, as did the California Supreme Court, that cities be granted a judicially created "public welfare defense" with respect to local regulations which conflict with federal antitrust laws. In other words, that cities be ". . . free to place their own parochial interest above the Nation's economic goals as reflected in the antitrust laws. . . ." *Lafayette* at 412-413· *Boulder* at 51. Allowing public interest claims to oust the national mandate for competition would be a radical departure from traditional preemption analysis and prior rulings of this Court.

2. The Ordinance Places Irresistible Pressure On Private Property Owners To Stabilize Their Rental Prices.

In an attempt to answer the preemption challenge, appellees argue that Section 1 of the Sherman Act preempts the Ordinance only if the latter ". . . mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases. . . ."[5] (Appellees' brief, at 12 n.32, citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).) Appellees then devote a major portion of their brief to arguing that no "conspiracy" has been shown so there can be no violation of

[5] Counsel for appellees has, in the constitutional law treatise he authored, rejected the approach he here advocates. He has recognized that a local law is preempted if it discourages conduct that federal legislation seeks to encourage (Here, for example, price competition). L. Tribe, *American Constitutional Law*, § 6-24, at 378 (1978).

Section 1.[6] However, appellees are guilty of misreading, misapplying and only selectively quoting from *Rice*, which, in the same sentence as that quoted by them, goes on to recognize that even a state law is preempted if it ". . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute," 458 U.S. at 661.

The Ordinance here examined places "irresistible pressure" on private property owners to stabilize, depress and peg their rental rates and thereby effectuates a per se violation of the Sherman Act. In his opinion for the Court in *Rice*, Justice Rehnquist, citing *Midcal*, specifically recognized that a governmental program which mandated price-fixing facially conflicted with the Sherman Act. 458 U.S. at 659. The Court noted: ". . . It is not surprising, therefore, that a statute which requires practices per se illegal under the Sherman Act may be subject to facial challenge under the Supremacy Clause." 458 U.S. 659-660 n.5. Thus, contrary to the ruling of the California Supreme Court and the argument advanced by appellees, (Appellees' brief, at 33-35), application of per se principles to governmental price stabilization programs is not a new or unprecedented concept.

The ruling in *Midcal* is particularly instructive in resolving the present preemption issue and disposing of appellees' preoccupation with "conspiracy." The Court found that the state's "plan" or "system" for wine pricing (445 U.S. at 102, 103) was preempted by the Sherman Act, without regard to the presence of any private conspiracy or combination. It was not the private party but the state that compelled wholesalers to charge certain prices. The Court focused on the reality of the market effect that resulted, not the presence of an agreement. The sole issue then remaining was whether the State of California's involvement in the price-fixing program was sufficient to invoke the immunity established in *Parker v. Brown*, 317 U.S. 341 (1943). It was not.

[6] Appellants have also contended that the Berkeley ordinance violates Section 2 of the Sherman Act. The California Supreme Court erroneously rejected this argument. (J.S. App. at A-34.)

In *Midcal*, Justice Powell, speaking for the Court, recognized that the evil of the wine pricing system was that it vertically dictated resale price maintenance which resulted in the destruction of horizontal price competition. 445 U.S. at 103. Appellees seek to distinguish *Midcal* because, there, the statute commanded private wholesalers to participate in the initial setting of the resale price. This distinction might be of some relevance in a private antitrust action against the wholesalers, but it is wholly irrelevant to the preemption issue.[7]

It must be recognized that this case was not filed as a federal antitrust action claiming damages for a "violation" of the Sherman Act; rather it is an action challenging the facial constitutionality of the Ordinance.[8] The issue is not whether Berkeley or its officials have engaged in a combination or

[7] Appellees' preoccupation with "conspiracy" and the specter of business tycoons gathered in a smoke-filled room to fix prices is entirely misplaced in a preemption case such as this. In any event, as established in appellants' brief at 22-23, the Ordinance does satisfy the "combination" provision of Section 1. By its terms, the Ordinance vertically mandates that property owners stabilize their rental prices. This forms a combination between appellees, on the one hand, and the property owners on the other. It also creates a horizontal combination among the landlords. That the property owners are unwilling parties who participate in the combination under compulsion does not negate the existence, strength or impact of the combination as a restraint of trade. *See Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). This concept of compelled participation is not unfamiliar in the context of vertical price stabilization programs or other per se violations of Section 1. *Fashion Originators Guild v. Ftc*, 312 U.S. 457 (1941) (concerted refusal to deal), and *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958) (tying arrangements).

[8] Contrary to appellees' suggestion (brief at 5), appellants' complaint sought a declaratory judgment that the Ordinance was facially unconstitutional (Complaint, J.A. at A-6-8). The complaint alleged that the ordinance substantially reduced the value of rental units, prevented landowners from charging rents sufficient to meet their mortgage obligations and inhibited the sale and refinancing of their properties. Complaint, ¶¶ 16-22 The Ordinance facially affects the purchase, sale and refinancing of property; it discourages capital improvements thereby affecting financing and the interstate flow of goods and materials. Ordinance §§ 10-13; J.S. App. G at A-122-131; see also J.S. App. at A-140-151. Indeed, the California Supreme Court (at appellees' express request, J.S. App. at A-5) did hear and decide the issue of whether the Sherman Act preempts the Berkeley Ordinance—so the issue is properly before the Court. (See appellants' brief at 7-8 and cases there cited.)

conspiracy[9] to restrain trade, but whether the Ordinance compels private property owners to fix, stabilize and depress prices at which they rent their property to private tenants contrary to the Sherman Act's mandate that prices in the private sector be established by competitive market forces. The Ordinance itself imposes upon the market-place a price-fixing, or rent stabilization program which prohibits private property owners in Berkeley from engaging in price competition in the rental of their units. The strangulation of price competition is the same whether accomplished by a private conspiracy or by this municipal ordinance.

Of course, not all local regulations which have some anticompetitive effects conflict with federal antitrust laws. The Court clearly spelled out, in *Rice*, the distinction which is applicable here. If the local regulation mandates private conduct which is not illegal per se, the local law does not facially conflict with the Sherman Act and thus is not facially preempted. Where the local regulation mandates private conduct, however, which has traditionally been found to be a per se violation of Section 1, particularly price-fixing[10], then the local law does facially and irresistibly conflict with the Sherman Act. 458 U.S. at 659; *Midcal*. As this Court stated in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951): "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." In *Midcal* and *Schwegmann*, this Court found that the Sherman Act preempted *state* price regulations. The present

[9] Thus appellees' disputable arguments that the city's action is not conduct of a market participant and does not involve competitive favoritism or corruption (brief at 20-24) are wholly irrelevant here.

[10] Thus, under appelleees' hypothetical examples, municipal regulations fixing the prices of private taxis, or parking garages (Appellees' brief, at 17) would be invalid under the Supremacy Clause, absent approval by the State. In California, the state legislature has authorized taxi fare regulation by a clearly articulated and affirmatively expressed policy which partically substitutes a regulatory regime for open price competition. *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1865 (1985); *after remand*, 754 F.2d 830 (9th Cir. 1985), *cert. granted*, ____ U.S. ____, 105 S.Ct. 3475 (1985). This *state* legislation meets the requirements for antitrust immunity under *Parker v. Brown*.

case involves only unauthorized municipal action and is, therefore, an even stronger case for favoring federal antitrust policy over local parochial interests.

This analysis also answers the arguments raised and alarm sounded by appellees that a ruling invalidating the Berkeley ordinance will prevent local governments from enacting a wide range of municipal programs. For example, appellees feign fear that an adverse ruling would jeopardize the power of local governments to enact municipal zoning ordinances (Appellees' brief, at 17-18), building codes, rules regulating street vendors, door-to-door solicitation after dark (Appellees' brief, at 27), sanitation standards for restaurants, barring children from convenience stores and poolhalls, regulating reasonable closing hours for dancehalls and restricting the locations of bars and adults theatres and bookstores. (Appellees' brief, at 28 n.66.)

The simple answer to appellees' fears is that none of the above-described local regulations even remotely compels private parties to engage in conduct which, absent the regulation, per se violates Section 1. Thus, none of those and similar police regulations would be facially in conflict with or preempted by the Sherman Act.

Appellants here do not seek a ruling which paralyzes local government from protecting the health, safety and welfare of its citizens. However, in pursuing its police power, a municipality cannot compel private conduct which interferes with federal legislative mandates. By requiring private property owners to stabilize and depress rental prices, Berkeley seeks to prohibit price competition, thus paralyzing the "central nervous system" of the economy and directly obstructing federal economic legislative objectives which require that prices in the private sector be establish through the forces of the free market.

C. Appellees' Plea For A "Public Welfare" Defense Has Been Rejected By Congress.

Appellees, their amici, and the court below refused to recognize that Congress has specifically rejected the very same proposition they are now urging this Court to embrace. Congress refused to enact a "public welfare," "health, safety and welfare" or "police power" exemption or defense to the antitrust laws. Under the circumstances, it would be anomalous for the Court now to do so.

If Berkeley is to be allowed to compel private property owners to stabilize, depress and fix their rental rates, such a decision is not for the Court, but for Congress. In similar situations where defendants urged approval of certain allegedly justified, or socially and economically desirable price stabilization programs, this Court has firmly ruled that Congress has outlawed all price-fixing schemes and, therefore, only Congress can establish exceptions to its legislative mandate:

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed *genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such shift is to be made, it must be done by Congress. Certainly Congress has not left us with any such choice.*

Maricopa, 457 U.S. at 346 (quoting *Socony-Vacuum*, 310 U.S. at 221-222 (1940)) (emphasis added).

As more fully set forth in Appellants' Opening Brief, (pp. 15-16)[11] municipalities specifically requested that Congress enact legislation to give them the same antitrust exemption or immunity as currently enjoyed by the states. Other proposals

[11] See also Brief Amicus Curiae of the California Apartment Association In Support of Appellants' Jurisdictional Statement (at 11-14); Brief Amicus Curiae of the Coalition for Competition in Apartment Rentals In Support of Appellants (at 21-23).

sought Congressional action which would provide local governments with a "health, safety or welfare" defense nearly identical to that advocated herein by appellees. Congress, in enacting the Local Government Antitrust Act of 1984 ("LGAA"), 15 U.S.C. § 35, rejected these proposals.[12] The House Judiciary Committee's reasoning is most instructive in this regard (H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 13 (1984) at p. 8):

> If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.

Appellees seek to downplay Congress' expression of intent by emphasizing the distinction between "exemption" and "violation" and arguing that the LGAA involved only the former. (Appellees' brief, at 26.) This, appellants submit, is plainly wrong. As *Lafayette* made clear, the word "exemption" is merely "a shorthand expression" for whether the Sherman Act was "intended by Congress to prohibit the anticompetitive restraint" imposed by municipal action. 435 U.S. at 393 n.8. Congress, aware of this Court's prior decisions such as *Boulder* and *Midcal*, plainly chose not to exclude local governments from the full application of the antitrust laws (House Report No. 98-965), which is almost precisely what appellees ask this Court to do. To apply a "social welfare" defense to a municipal price stabilization program, as did the Court below, is to grant cities an exemption from federal antitrust laws. This would allow cities to elevate their "parochial interests" to a preferred position over federal antitrust objectives contrary to the rulings of this Court and the long-standing mandate of Congress, recently reaffirmed, that only *states* are permitted the discretion

[12] This Congressional action lays to rest appellees' undue emphasis on the Court's "different complexion" footnotes in *Lafayette*, 435 U.S. at 417, n.48; *Boulder*, 455 U.S. at 56, n.20. Moreover, subsequent to both cases, this Court in *Rice*, supra, reaffirmed the rule in *Midcal*, supra, that even non-immune state imposed price restraints are facially preempted by the Sherman Act. *A fortiori*, mere municipal price stabilization programs must be invalidated.

to displace the competitive regime with regulatory policy.[13] This is particularly true in the housing industry which is vital to interstate commerce (*see Russell v. United States*, ____ U.S. ____, 105 S.Ct. 2455 (1985); *McLain v. Real Estate Board*, 444 U.S. 232 (1980)).

III. THE BERKELEY ORDINANCE IS NOT AUTHORIZED BY A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE LAW. IT THEREFORE IS NOT EXEMPT NOR IMMUNE FROM THE COVERAGE OF FEDERAL ANTITRUST LAWS.

In *Parker v. Brown, supra*, this Court recognized that federal antitrust legislation was not intended by Congress to apply to *state* programs. Simply stated, the state can make the sovereign determination that, in certain well-defined situations, free market policies should be displaced by a regulatory regime. Similarly, the state can, through clearly articulated and affirmatively expressed legislation, authorize local government units to enact regulations which would otherwise conflict with federal antitrust laws. *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 105 S.Ct. 1713 (1985). However, cities acting alone, without specific state authorization, have no such power. *Boulder, supra.*

[13] As stated in Appellants' Opening Brief (at 37-41), the California Supreme Court's ruling elevates local price regulation programs to a higher priority than the Sherman Act's prohibition against price stabilization unless plaintiffs can establish the existence of alternative means for effectively achieving the City's purposes in a manner which would have a less instrustive impact on federal antitrust policies. The net effect of this test is to give preference to local regulations over federal legislative mandate.

Indeed, if any such "social welfare" defense is to be developed, the burden of proving that no reasonable alternative exists should be upon the City which seeks to avoid supervening federal legislative mandate.

In our present case, it would be difficult to envision any more intrusive impact on federal antitrust policy than price-fixing. The California Legislature has, itself, adopted "free marketplace" principles with respect to housing. Health & Safety Code, § 50001. The dissent of Justice Lucas from the ruling below sets forth various alternatives through which Berkeley could achieve its housing objectives by means more consistent with the strong federal mandate favoring price competition. (J.S. App. at A-86.)

Thus, if the California Legislature deemed rent control to be important to the welfare of its citizens, it could enact a rent control statute or specifically authorize its cities and counties to adopt such measures. The state has, in other contexts, found it necessary in furthering the public interest to restrict price competition in certain segments of the private sector. *Golden State Transit Corp. v. City of Los Angeles, supra,* (taxicab fares); *Springs Ambulance Service, Inc. v. City of Rancho Mirage,* 745 F.2d 1270 (9th Cir. 1984). The California legislature has not, however, enacted rent stabilization statutes nor has it authorized cities to adopt rent control ordinances, and therefore the Berkeley ordinance is entitled to no immunity from federal antitrust laws.

Appellees' argument that the legislature authorized this Berkeley rent control ordinance strains credibility. First, they cite a ministerial "ratification" by the legislature in 1972 (eight years prior to the enactment of the Ordinance here challenged). (Appellees' brief, at 36.) This novel argument has surfaced for the first time in appellees' brief on the merits here. That legislative "ratification" was pursuant to a practice whereby *every* charter amendment adopted by any California charter city was required to be approved by the legislature. These ratifications were automatically and *without exception* passed by the legislature[14] and can hardly be deemed a state policy decision or authorization to displace federal antitrust mandates with local regulation. In any event, the 1972 Berkeley rent control charter amendment there involved was subsequently held unconstitutional by the California Supreme Court. *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 550 P.2d 100, 130 Cal.Rptr. 465 (1976). By the time the current Berkeley Ordinance was adopted, the "legislative ratification" procedure for charter amendments had been abolished and the Legislature did not subsequently approve any form of rent control. It is thus clear that the current Ordinance has never been approved by the legislature. In view of appellees having raised this dubious

[14] This practice was required by Article XI, § 3 of the California Constitution until 1974 when it was repealed because it was a meaningless act that was a bother to the Legislature. While it was in effect "there [were] no instances where a charter or amendment has been rejected by the Legislature." Staff Analysis, California Senate Local Government Comm., Assembly Constitutional Amendment 81 (Miller) (amended May 1, 1974).

argument, appellants are constrained to point to a far more relevant and more recent indication of the intent of the California Legislature regarding rent control, which can be found in a 1976 statute *prohibiting* rent control. California Assembly Bill 3788 (Campbell, 1976). This statute was vetoed by then-Governor Edmund G. Brown, Jr., but nevertheless indicates the latest legislative view of rent control in California.

Next, appellees argue that municipal imposition of rent control was "contemplated" by the state legislature in certain provisions in the Government Code (§§ 65580, *et seq.*). These statutes merely require each city to develop a general land use plan which includes a "housing element." The legislature has expressly stated that these Government Code sections shall not be construed to be a grant or repeal of authority which may exist for a local government to impose rent control. Government Code § 65589. Thus, these statutes do not, themselves, authorize local rent control; nor do they meet the test consistently applied by this Court for finding that municipal ordinances are authorized by state action: In *Town of Hallie,* 105 S.Ct. at 1716, the Court reaffirmed its earlier statement in *Lafayette,* 435 U.S. at 413, that ". . .to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'"

In *Town of Hallie,* there were numerous Wisconsin statutes which specifically authorized cities to fully regulate sewerage systems, including determining the area to be served. The legislature clearly authorized a regulatory scheme as to sewerage systems to be administered by cities. Once it was recognized that the state legislature authorized a regulatory regime, the Court proceeded to find that the specific anticompetitive conduct alleged in the antitrust suit was contemplated by the legislature.

Town of Hallie in no way supports appellees' arguments for state action immunity here. The state of California has never made the requisite threshhold decision to displace competition with a regulatory regime in housing. Indeed to the

contrary, the California legislature, in 1977, enacted Health & Safety Code § 50001 which expressly adopts as state policy regarding housing. The statute expressly adopts as state policy the promotion of "free marketplace" principles in the California housing market:

> § 50001. Importance of Housing
>
> The Legislature finds and declares that the subject of housing is of vital statewide importance to the health, safety, and welfare of the residents of this state, for the following reasons:
>
> . . .
>
> (c) *A helathy housing market is one in which residents of this state have a choice of housing opportunities and one in which the housing consumer may effectively choose within the free marketplace.*
>
> (d) A *healthy housing market* is necessary both *to achieve a healthy state economy* and to avoid an unacceptable level of unemployment. (Emphasis added.)

In Health & Safety Code § 50202, the legislature further provides "nothing in this division shall authorize the imposition of rent regulations or controls . . ." (with certain exceptions not here applicable). Appellees completely ignore these recent California statutes and, instead, make a vague and wholly unsupportable argument that, in other statutes, the legislature "contemplated" rent control. (Appellees' brief, at 38-39). The Health & Safety Code sections cited above (and related provisions) preclude any argument that the state has chosen to displace free market principles with regulation in the rental housing market.

Even the Government Code Sections cited by appellees fail to support their argument that rent control was contemplated, much less authorized, by the legislature. Appellees' selective and partial quotation of Government Code 65580 (Appellees' brief, at 38) conceals the fact that the policy embodied in that statute is that municipalities should promote the improvement and development of housing, not fix the price of rents. "Local

and state governments have a responsibility to use the powers vested in them *to facilitate the improvement and development of housing* to make adequate provision for the housing needs of all economic segments of the community." (Emphasis added; italicized portion omitted from appellees' quotation of the text of the statute.) A reading of the complete wording of the statute demonstrates that it in no way contemplates, or authorizes, rent control.

Thus, the mandate of the relevant Government Code provisions is to compel cities to develop land use and housing plans which will, in the future, promote the development of new housing construction and improvement of existing housing. This should be accomplished in a "free marketplace" environment. Health & Safety Code § 50001 (which is a provision "deemed controlling" with respect to all state housing law and policy. Health & Safety Code § 50200).

In the final analysis, the authority of Berkeley to enact its rental price stabilization Ordinance is not derived from any state statute which clearly articulates and affirmatively expresses a state sovereign decision to displace price competition with regulation. As appellees, themselves, are forced to concede, Berkeley's power to impose rent control is based on municipal police power. (Appellees' brief, at 39 n.89.) The Court below similarly found that "California has no State rent control statute." *Fisher*, 37 Cal.3d at 655, J.S. App. at A-6. See also: *Santa Monica Pines, Ltd. v. Rent Control Board*, 35 Cal.3d 868, 297 P.2d 27, 201 Cal.Rptr. 593 (1984), reaffirming the non-statutory police power roots of municipal rent control in California. This is precisely the situation which this Court examined in *Boulder* and found insufficient to confer immunity from federal antitrust laws.

To paraphrase Justice Brennan's words in *Boulder*, 455 U.S. at 55-56: The relationship of the State of California and Berkeley's rent control Ordinance "is one of precise neutrality." We are faced here with a broad and all-pervasive rent control

ordinance with no state legislative authorization[15] to support it. Clearly, the State of California has not made a sovereign policy decision to displace antitrust policy, price competition and free market principles with a regulatory regime.

IV. CONCLUSION

This cases poses a most clear example of conflict between federal and local law. The Sherman Act's mandate of price competition is clearly contravened by a non-immune municipal ordinance which prohibits price competition under threat of criminal prosecution. For all of the foregoing reasons, the decision below should be reversed and the Berkeley rent control Ordinance declared facially unconstitutional under the Supremacy Clause.

Dated: November 1, 1985

Respectfully submitted,

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[15] Moreover, there is a complete absence of any state guidelines or active state supervision to prevent Berkeley from pursuing flagrant and extreme anticompetitive conduct unnecessary to the accomplishment of state housing goals. In *Midcal*, a state wine pricing regulation of private parties was held preempted because of lack of active state supervision; *a fortiori* this city price regulation of the private rental market must be invalidated, not only for lack of active state supervision, but also because the city ordinance operates totally independent of any state guidelines which are necessary to assure that the immunity is no broader than necessary to meet the sovereign's regulatory interest. *Lafayette*, 435 U.S. at 417-418 (Justice Marshall, concurring opinion). As Chief Justice Burger observed, *Lafayette*, 435 U.S. at 425-426 (concurring opinion): "This supplemental inquiry would consist of determining whether the implied exemption from federal law 'was necessary in order to make the regulatory Act work, and even then only to the minimum extent necessary.'" (citing *Cantor v. Detroit Edison Co.*, 428 U.S. 579 at 597 (1976)).

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No. 84-1538 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, *et al.*,
Appellants,

v.

CITY OF BERKELEY, *et al.*,
Respondents.

On Appeal from the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CALIFORNIA ASSOCIATION OF REALTORS IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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26 pp

TOPICAL INDEX

	Page
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	iv
BRIEF AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	1
INTRODUCTION	2
ARGUMENT	5
THE RENT CONTROL ORDINANCE ENACTED BY THE CITY OF BERKELEY OBSTRUCTS THE SHERMAN ACT AND IS PREEMPTED UNDER THE SUPREMACY CLAUSE	5
A. Federal Law Requires that Local Government Bodies be Subjected to and Controlled by the Sherman Act	5
B. Sherman Act Preemption of Municipal Ordinances Under the Supremacy Clause	7
C. The Rent Control Ordinance has a Not Insubstantial Effect Upon Interstate Commerce	9
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
CASES:	
Albrecht v. The Herald Co., 390 U.S. 145 (1968)	7
Birkenfeld v. City of Berkeley, 17 Cal.3d 129 (1976)	3
California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	5,7
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	6,11,14, 16,18,19
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	14,18,19
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	7
Fisher v. City of Berkeley, 37 Cal.3d 644 (1984)	*passim*
Hicks v. Miranda, 422 U.S. 332 (1975)	4
Hines v. Davidowitz, 312 U.S. 52 (1941)	7,18
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951)	7
McLain v. Real Estate Bd., 444 U.S. 232 (1980)	4,9,10, 12,13
Parker v. Brown, 317 U.S. 341 (1943)	3,18,19
Town of Hallie v. City of Eau Claire, ____ U.S. ____, 53 L.W. 4418 (1985)	6,14,16, 18,19
United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944)	5
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	8
U.S. v. Topco Associates, Inc., 405 U.S. 596 (1972)	5,7
United States v. Trenton Potteries Co., 273 U.S. 392 (1927)	8,9
STATUTES:	
15 U.S.C. Section 1 et seq	*passim*
Berkeley Ordinance 5612-N.S. ("Measure D")	*passim*

	Page
SECONDARY AUTHORITY:	
Areeda, *Antitrust Law* (Little, Brown & Co., Supp. 1982)	10
Baird, *Rent Control: The Perennial Folly*	11
Bay Area Council, *Rental Housing in California: Obstacles & Opportunities*, April 1983	12
Fraser Institute, *Rent Control, A Popular Paradox* (1975)	11
Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 Cornell L.Rev. 604 (1984)	11
Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691 (1983)	11
Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 721 (1983)	12
Tribe, *American Constitutional Law* (Foundation Press, 1978)	17

No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, *et al.*,
Appellants,

v.

CITY OF BERKELEY, *et al.*,
Respondents.

On Appeal from the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE CALIFORNIA ASSOCIATION OF REALTORS IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

Pursuant to Rule 36 of the Rules of the Court, amicus hereby seeks leave to file the attached brief amicus curiae in support of plaintiffs and appellants, Alexandra Fisher, et al.

Amicus California Association of Realtors (C.A.R.) is a voluntary trade association whose members consist of Boards of Realtors and those persons licensed as real estate brokers and salespersons who are members of local boards. C.A.R. is the largest state trade association in the United States and has over 180 affiliated Boards of Realtors and over 100,000 members. The issues affecting the power of local government to regulate competition in the real estate market are of vital importance to amicus and the industry it represents. This case presents the

important issue of whether municipalities can fix the price of rents chargeable by private landowners for rental housing in the absence of a clearly articulated and expressed state policy to displace price competition with municipal regulation. The issues are compounded by the lower court's significant departure from the precedent firmly established by this Court in earlier case law. If the lower court's decision is allowed to stand, municipalities may have "carte blanche" to regulate any aspect of the economy in the name of health, safety, and welfare, regardless of the effect on overriding state and national free-market goals. Because of the *stare decisis* effect on all lower courts if this case is summarily dismissed, amicus strongly urges this Court to grant plenary consideration of the issues and overturn the test established by the court below. Consequently, we strongly feel the need to file a brief at the jurisdictional phase in spite of the disfavor alluded to in Rule 36.1. For these reasons, amicus is deeply concerned over the outcome of this case, and submits this brief to assist the Court in its consideration of the matter.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36, the California Association of Realtors respectfully submits this brief amicus curiae in support of Plaintiffs and Appellants, Alexandra Fisher, et al. A motion pursuant to 36.1 has been attached requesting leave to file this brief in the absence of consent of the respondent.

Amicus curiae California Association of Realtors (C.A.R.) is a voluntary trade association whose members consist of Boards of Realtors in California and those persons licensed by the state of California as real estate brokers and salespersons who are members of local boards. C.A.R. is the largest state

trade association in the United States and has over 180 affiliated Boards of Realtors and over 100,000 members.

The mission of C.A.R. is to serve in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses sucessfully with integrity and competency. Moreover, C.A.R. serves to promote, through collective action, the preservation of real property rights.

Our interest in this case lies with the fact that the opinion of the California Supreme Court undermines the preservation of real property rights and creates new rules of law with far-reaching significance to the real estate industry engaged in the development and/or rental of real property. The California test would allow municipalities to promote their own purely parochial interests at the expense of the more overriding state and national goals.

Counsel for C.A.R. is familiar with the questions involved and the scope of their presentation and believe that further argument on the issues discussed by the amicus brief will be helpful to this Court.

INTRODUCTION

This Court clearly has established in several recent decisions that a municipality is subject to the federal antitrust laws unless it is acting pursuant to "clearly articulated and affirmatively expressed" "state policy to displace competition with regulation or monopoly public service." This approach has been found desirable because a state still can administer regulatory policies free of the inhibitions of federal antitrust laws without at the same time permitting parochial interests to disrupt the Nation's free-market goals.

On its face, the rent control ordinance conflicts with the policies and purposes of the Sherman Act. Under the ordinance, the city of Berkeley fixes the rent chargeable by private landlords of rental housing. The ordinance expressly con-

templates price-fixing, an activity long held as *per se* invalid under the Sherman Act. Moreover, the fact that Berkeley is setting a ceiling rather than a floor on rents is of no consequence; maximum price-fixing is as deleterious to competition as minimum price-fixing. This type of price-fixing creates the potential power to eliminate competition in the rental housing market, displaces supply and demand, and deprives landlords of their independent judgment in the determination of prices for rental housing. Rent control is an unreasonable and unlawful restraint of trade and, as such, is *per se* invalid, without the necessity of minute inquiry. It clearly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and therefore, the ordinance should be preempted by the Sherman Act under the Supremacy Clause of the United States Constitution.

Although states are free to regulate competition without being subjected to the inhibitions of federal antitrust law, municipalities are not accorded the same "state action immunity" because they are not themselves sovereign. Municipalities are not beyond the congressionally intended scope of federal antitrust laws unless they are acting pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with municipal regulation. In this context, the California Supreme Court has acknowledged "the conceded absence of any state statute authorizing local legislation on the subject." *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 140 (1976). California has not enacted a state rent control statute and the requirement of state action is not satisfied when the State's position is one of mere neutrality respecting the municipal action challenged as anticompetitive. Therefore, the rent control ordinance enacted by the city of Berkeley is not saved from Sherman preemption under the doctrine of *Parker v. Brown,* 317 U.S. 341 (1943).

In this case, moreover, the nexus between the rent control ordinance and interstate commerce is sufficient to invoke federal jurisdiction under the Sherman Act. Rent control causes serious economic dislocation, including retardation in the volume of rental housing sales and production. Consequently, the demand for financing and title insurance is severely impaired, a

large portion of which is supplied by multistate lending institutions and interstate title insurance corporations. Investors overwhelmingly agree that rent control has created a significant disincentive for investment in rental housing. Even those investors who desire to purchase rental housing are unable to do so because lending institutions are reluctant to supply the financing. This has led to a huge reduction in the price and volume of sales transactions of rental housing. Clearly, every commercial industry remotely connected with rental housing has felt the impact of these municipal rent control ordinances.

In *McLain v. Real Estate Bd.*, 444 U.S. 232 (1980), this Court found a similar interstate effect sufficient to satisfy the Sherman jurisdictional requirements. *Id.*, at 242. Therefore, because the rent control ordinance, as a matter of practical economics, has a not insubstantial effect upon interstate commerce, the finding of federal jurisdiction should not stand as an obstacle to the proper resolution of this case on the merits.

Finally, amicus curiae California Association of Realtors urges this Court to consider this case on the merits because of the threat posed by the test created below by the California Supreme Court. This modified commerce clause test, established to determine the applicability of the Sherman Act to anticompetitive municipal regulation, significantly departs from the precedent established by this Court in recent decisions. As enunciated by the court below, it threatens the continued economic stability of this state, giving municipalities the power to override, in the name of health, safety, and welfare, more important state and national free-market goals. Unfortunately, this threat will be devastating if this California test is given *stare decisis* effect upon all lower courts through a summary dismissal by this Court. *See Hicks v. Miranda,* 422 U.S. 332 (1975). Because of the aforementioned considerations, we respectfully urge this Court to give plenary consideration to this very important case.

ARGUMENT

THE RENT CONTROL ORDINANCE ENACTED BY THE CITY OF BERKELEY OBSTRUCTS THE SHERMAN ACT AND IS PREEMPTED UNDER THE SUPREMACY CLAUSE

A. Federal Law Requires that Local Governmental Bodies be Subjected to and Controlled by the Sherman Act.

State and local governments alike face constitutional restrictions upon the exercise of their police power because of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3. The plenary power of Congress to regulate commerce imposes a preemptive limitation upon the exercise of local police power. The most expansive exercise of Congress' power under the Commerce Clause to date is the Sherman Antitrust Act, 15 U.S.C. Sec. 1, et seq. This Court has emphasized the importance of the federal procompetitive policy, stating:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) . . . . [*California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, 445 U.S. 97, 110-111 (1980).]

The Sherman Act is one of the most comprehensive of all federal statutes. This Court has noted that the statute itself

> "shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." [*United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 553 (1944).]

Congress deliberately used broad language in drafting the Sherman Act in an attempt to "establish a regime of competition as the fundamental principal governing commerce in this country." *City of Lafayette v. Louisiana Power and Light Company,* 435 U.S. 389, 398 (1978). In *Lafayette,* this Court concluded that, in light of the "potential of serious distortion" to the regime of competition, local governments could not be permitted to override the national policy favoring free competition. *Lafayette,* 435 U.S. at 408. The fact that anticompetitive local policies might be subject to correction through the political process was explicitly held insufficient to justify conferring a blanket exemption on local government:

> In enacting the Sherman Act, however, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy, to be administered by neutral courts, which would guarantee every enterprise the right to exercise "whatever economic muscle it can muster" [citation] without regard to the amount of influence it might have with local or state legislatures. [*Lafayette,* 435 U.S. at 406-407 (footnote omitted).]

In *Town of Hallie v. City of Eau Claire,* 53 L.W. 4418 (1985), this Court recently concluded that municipalities are "not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Id.,* at 4419. To obtain exemption from the federal antitrust policies, "municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service'" *Id.,* at 4419 (quoting *Lafayette,* 435 U.S. 389, 412). Municipalities, therefore, in the exercise of their local policy powers, may not seek to further purely parochial interests at the expense of more overriding state and national free-market goals. *See Town of Hallie,* 53 L.W. at 4422. Any municipal ordinance authorizing such anticompetitive conduct, in the absence of clearly articulated state policy, should be preempted by Sherman under the Supremacy Clause.

B. Sherman Act Preemption of Municipal Ordinances Under the Supremacy Clause.

A municipal ordinance is preempted by federal law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Price-fixing schemes are traditional and vulnerable targets of antitrust scrutiny. These schemes displace supply and demand and the judgment of independent traders in the determination of prices in the marketplace. Rent control definitionally restrains the setting of competitive pricing in a free market. It constitutes price-fixing, first and foremost among the *"per se"* violations of the Sherman Act. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911). The fact that the City of Berkeley is setting a ceiling rather than a floor on rents chargeable by private landowners is of no consequence; maximum price-fixing is a per se violation of the Act. *Albrecht v. The Herald Company,* 390 U.S. 145, 152-153 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 213 (1951).

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980), this Court found that a state statute, which required members of the California wine industry to file fair trade contracts or price schedules with the state, facially conflicted with the Sherman Act because it mandated resale price maintenance, an activity that has traditionally constituted a *per se* violation of federal antitrust law. *Id.,* at 102-103. Clearly, a municipal ordinance that mandates price-fixing of multifamily residential rents, which is *per se* invalid under the Act, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines v. Davidowitz,* 312 U.S. at 67.

This Court has repeatedly stated that these policies are the preservation of free enterprise and open competition. *See, e.g., United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97, 110-111 (1980). The power to

fix prices constitutes a serious threat to that procompetitive policy:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices .... *Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry* .... [*United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (Emphasis in original).]

By prohibiting upward price competition, rent control has the direct effect of "elimination of one form of competition." *United States v. Trenton Potteries Co.*, 273 U.S. at 397 (1927). Consequently, the carefully considered economic objectives of Congress are frustrated by local ordinances enacted to further purely parochial interests of the municipality. In the absence of municipal activity pursuant to clearly articulated and expressed state policy to displace competition with municipal regulation, the reasonableness of these rent controls is of no significance. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court foreclosed any inquiry into the wisdom of protecting competition in the marketplace:

> Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended. [*U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).]
>
> * * *
>
> Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. [*Id.*, at 226 n.59.]

The price-fixing ordinance enacted by the City of Berkeley, in the abstract, creates the "potential power" to eliminate competition in the rental housing market. It constitutes an "unreasonable and unlawful" restraint of competition and, as such, is a *per se* violation of federal antitrust law, "without the necessity of minute inquiry." *See Trenton Potteries*, 273 U.S. at 397. Therefore, because the rent control ordinance facially conflicts with federal antitrust policy under the Sherman Act, it is preempted by the Sherman Act under the Supremacy Clause.

C. The Rent Control Ordinance has a Not Insubstantial Effect Upon Interstate Commerce.

The broad authority of Congress to regulate under the Commerce Clause has been interpreted to extend beyond activities that are "in commerce" to include wholly intrastate activities that have a substantial "effect on commerce." *McLain v. Real Estate Bd.*, 444 U.S. 232, 241 (1980).

The Court in *McLain* stated:

> This Court has often noted the correspondingly broad reach of the Sherman Act .... (Citations omitted.)
>
> * * *
>
> It can no longer be doubted, however, that the jurisdictional requirement of the Sherman Act may be satisfied under either the "in commerce" or the "effect on commerce" theory .... (Citations omitted.) [*Id.*, at 241-242.]

Phillip Areeda, interpreting the *McLain* decision, stated:

> [T]he court [elsewhere] made clear that there must be a nexus, at least "as a matter of practical economics" between the challenged conduct and interstate

> commerce. Thus, *McLain* seems to mean that although the plaintiff need not make a "particularized showing" of an actual interstate effect caused by the challenged conduct, he must show that it would inherently tend, as a matter of practical economics, to have an interstate effect. [P. Areeda, *Antitrust Law,* paragraph 232-1c (Supp. 1982).]

Federal jurisdiction under the Sherman Act may be established by a showing that the allegedly anticompetitive conduct contemplated by the municipal rent control ordinance has, "as a matter of practical economics," a not insubstantial effect on the interstate commerce involved. *McLain,* 444 U.S. at 246.

McLain involved a situation in which the real estate brokers in the New Orleans area allegedly agreed to fix brokerage commissions through uniform rates, engaged in fee-splitting and suppressed market information useful to buyers and sellers of real estate. This Court found federal jurisdiction based upon the effect of the alleged brokerage activities on interstate commerce. *Id.,* at 242. In finding a nexus between the brokerage activity and interstate commerce, the Court noted the following:

> It is clear that an appreciable amount of commerce is involved in the financing of residential property in the Greater New Orleans area and in the insuring of titles to such property. The presidents of two of the many lending institutions in the area stated in their deposition testimony that those institutions committed hundreds of millions of dollars to residential financing during the period covered by the complaint. The testimony further demonstrates that this appreciable commercial activity has occurred in interstate commerce. Funds were raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multistate lending institutions took mortgages insured under federal programs which entailed interstate transfers of premiums and settlements. Mortgage obligations physically and constructively were traded as financial instruments in the interstate secondary mortgage market. Before making a mortgage loan in the Greater New Orleans area, lending institutions usually, if not always, required title insurance, which was furnished by interstate corporations. [*Id.,* at 245.]

As a matter of practical economics, a not insubstantial effect upon interstate commerce clearly can be established in this case based upon the nexus between the rent control ordinance enacted by the city of Berkeley and the flow of goods and services in interstate commerce. In this case, the interstate commerce effect when a municipality imposes an artificial ceiling on rents charged by private landowners is even greater than that interstate impact which was held sufficient to invoke federal jurisdiction in *McLain.* Justice Lucas correctly noted in his dissent below that "[e]conomists are virtually unanimous in their condemnation of rent control laws." Opinion below, 37 Cal.3d 644, 715-716 (1984), *citing, e.g.,* Baird, *Rent Control: the Perennial Folly* at 54-78; *Rent Control, A Popular Paradox* (The Fraser Institute edition 1975) [essays by nine economists]; Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 691, 698 (1983). He points out that most economists take the view that rent control schemes cause what the Supreme Court has called "serious economic dislocation." Opinion below, 37 Cal.3d at 716, *citing Lafayette,* 435 U.S. at 412-413. He quotes, as example, the following observation made by Professors Milton Friedman and George Stigler:

> Rent ceilings, therefore, cause haphazard and arbitrary allocation of space, inefficient use of space, *retardation of new construction* and indefinite continuance of rent ceilings, or subsidation of new construction and a future depression in residential building. [Opinion below, 37 Cal.3d at 716 (Lucas, J., dissenting) (*citing* Friedman and Stigler, *Roofs or Ceilings? The Current Housing Problem,* in *Rent Control, A Popular Paradox,* p. 100 (The Fraser Institute edition (1975)).]

Most economists and commentators agree that maximum rent ceilings have a negative impact on the production of new rental housing. *See, e.g.,* Hirsch, *From "Food for Thought" to*

"Empirical Evidence" About Consequences of Landlord-Tenant Laws, 69 Cornell L.Rev. 604, 609-610 (1984) (concluding that in the long run, rent control will have a chilling effect on investors, curtailing the supply of housing); Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 721, 723 (1983) (asserting that the most harmful economic effect of rent control is manifested by its impact on housing production).

In discussing the effect of brokerage activities on the frequency and terms of residential sales transactions, the *McLain* court stated that "whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance." *McLain*, 444 U.S. at 246. These two commercial activities were shown in *McLain* to have occurred in interstate commerce. *Id.*

A retardation in the production of new rental housing, caused by the rent control ordinance, directly affects the demand for financing and title insurance. Just as in *McLain*, funds for financing the production of new rental housing in Berkeley are raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multistate lending institutions take mortgages insured under federal programs which necessitate the interstate transfer of premiums and settlements. Moreover, mortgage obligations are physically and constructively traded as financial instruments in the interstate secondary mortgage market. In addition, lending institutions in California usually require title insurance before making a mortgage loan. This title insurance is often furnished by interstate corporations.

The California Association of Realtors (C.A.R.) is especially aware of the substantial impact that rent control has on investment in multifamily residential housing units. A publication by the Bay Area Council of San Francisco entitled, *Rental Housing in California: Obstacles and Opportunities* (April 6, 1983) revealed the following:

> The summary of results stated, "rent control is a major barrier to investment in rental housing development projects in California—even in communities without rent control ordinances."

> Of the mortgage lenders surveyed, 82% agreed that "rent control is a threat to any new multifamily project in California, no matter where it is located . . ." (See *Id.*, Appendix H, A-147-148, below.)

The report continued by stating that rent control was by far the most frequently named disincentive for multifamily lending in California. Clearly, rent control "affects the demand for financing and title insurance" both in and out of the State of California. *See McLain*, 444 U.S. 246.

To state that the investment rate of return is significantly less on residential rental property subject to artificially-imposed rent controls than on the same property unencumbered by anticompetitive municipal regulation is to state the very obvious. The Bay Area Council report is not unique to that particular area. Realtors throughout California and elsewhere have been severely impaired by rent control ordinances, similar to Berkeley's Measure D. In fact, repercussions are even felt in real estate market yet unaffected by rent control. Investors are generally unwilling to invest capital into traditionally risky real estate ventures, such as multifamily rental housing, upon which unreasonably low ceilings have been imposed. As was pointed out in the Bay Area Council report, even investors who desired to purchase rental housing may be unable to do so since mortgage lenders are unwilling to risk financing rental housing development projects in California.

This reluctance to invest in rental housing in California leads to a decrease in rental housing construction and a significant drop in the value of existing units. Buyers are unwilling to buy and sellers are unable to sell. Unfortunately, all of this serious economic dislocation is caused by municipalities seeking to further their own parochial interest at the expense of more significant, overriding state and federal free-market goals.

The economic impact of Berkeley's rent control on interstate commerce is widespread. In sum, "as a matter of practical economics," the rent control ordinance enacted by the city of Berkeley has an effect upon interstate commerce that is not insubstantial; therefore, federal jurisdiction under the Sherman Act may be firmly established.

II

THE TEST CREATED BY THE CALIFORNIA SUPREME COURT DEPARTS FROM PRECEDENT FIRMLY ESTABLISHED BY THIS COURT

In *Lafayette,* this Court rejected the argument that deference to local government policy compelled the finding of an implied exclusion from antitrust prohibitions for "actions of municipalities that exist to serve the public weal, . . ." 435 U.S. at 403. Writing for the Court, Justice Brennan stated:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.
>
> We conclude that these additional arguments for implying an exclusion for local governments from the antitrust laws must be rejected. [*Lafayette,* 435 U.S. at 408 (footnote omitted).]

In three recently decided municipal antitrust cases, *Lafayette, Boulder,* and *Town of Hallie,* this Court has clearly stated that anticompetitive activity engaged in by municipalities is shielded from antitrust scrutiny only in situations in which the action is taken "pursuant to state policy to displace service," *Lafayette,* 435 U.S. at 413, which is both "clearly articulated and affirmatively expressed." *Boulder,* 455 U.S. at 545; *see also Town of Hallie,* 53, L.W. at 4419-4420. This Court reiterated in *Town of Hallie* that "[m]unicipalities are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie,* 53 L.W. at 4419.

The California Supreme Court's significant departure from this Court's clearly defined test in *Lafayette, Boulder,* and *Town of Hallie* is perplexing. The court below muddied the water by maintaining exactly the opposite position:

> To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate for the motives that underlie local government regulation (citations omitted), courts must develop tests that recognize a public welfare "defense" to alleged violation of the antitrust laws by municipalities. [Opinion below, 37 Cal.3d at 673.]

In designing this "public welfare defense," by which a municipality can engage in, mandate, and authorize conduct, without state authorization, that is anticompetitive in both purpose and effect, the court below created a standard under which the anticompetitive ordinance is deemed not to conflict with the Sherman Act. To withstand Sherman scrutiny, the municipal ordinance need only comport with what is in essence an amalgam of substantive due process and Commerce Clause negative implications tests.

To create this "public welfare defense," the California Supreme Court rejected the traditional *per se* prohibition of price-fixing, because "[i]n our view, maximum rent price-fixing, implemented by local government, is simply not of the same character as price fixing among private business defendants." Opinion below, 37 Cal.3d at 670. In circumventing existing precedent established by this Court in order to force antitrust policy to give way to the local police power autonomy, the California court candidly admitted that it was motivated by a desire to restore anticompetitive autonomy to cities, stating that "if unbending application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate municipal regulation, we will not hesitate to cautiously depart from traditional rules." Opinion below, 37 Cal.3d at 664.

The admitted purpose of this test, which fairly conclusively presumes the supremacy of local policy over national antitrust policy, is to prevent "judicial second-guessing of local decisions to accomplish proper local purposes." Opinion below, 37 Cal.3d at 673. The California court articulated its test in the following manner:

> Adapting the court's commerce clause test to this facial section 1 attack on a municipal rent control ordinance, we conclude that if a municipal regulation

> has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. [Opinion below, 37 Cal.3d at 675 (footnotes omitted).]

The court stated that it was seeking to establish a test "that is sufficiently flexible to accommodate the interest of local government in promoting public health, safety and welfare programs or regulation." *Id.*, at 674. The court apparently disregarded the serious threat to national policy, alluded to by this Court in *Lafayette* and *Town of Hallie*, if municipalities are "free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects." *Lafayette*, 435 U.S. at 408; *see also Town of Hallie*, 53 L.W. at 4422.

Moreover, the California court explained that this exemption applies not only to "traditional" or "integral" governmental functions, but rather would immunize "all local action rationally related to the promotion of local health, safety, and welfare." Opinion below, 37 Cal.3d at 675, n.27. Although the court borrowed elements of "evenhandedness" and "less intrusive means" from this Court's previous Commerce Clause cases to establish its test, such borrowing was purposefully selective since the court expressly excludes this Court's well-established cost-benefit balancing test:

> We will, however, depart from the United States Supreme Court's commerce clause test is [sic] one significant respect. We will not apply the wide-ranging, essentially standardless cost-benefit analysis employed in the court's recent "balancing" decisions. (See, e.g., *MITE Corp.*, supra, 457 U.S. 624; *Kassel*, supra, 450 U.S. 662; *Clover Leaf Creamery*, supra, 449 U.S. 456; see generally, Eule, *Laying the Dormant Commerce Clause to Rest* (1982) 91 Yale L.J. 425 [criticizing the court's balancing approach, and proposing an alternate standard]; Maltx, *How Much Regulation is too Much—An Examination of Commerce Clause Jurisprudence* (181) 50 Geo.Wash.L.Rev 47 [same]; Tushnet, *Rethinking the Dormant Commerce Clause* 1979 Wis.L.Rev. 125 [same].) [Opinion Below, 37 Cal.3d at 675.]

Significantly, the California court is borrowing tests from the wrong body of law. The line of authority cited above to circumvent the reach of federal antitrust law deals with the "dormant Commerce Clause," also known as the "negative implications" of the Clause, which remain as a limit to state action upon interstate commerce even in the absence of preemptive congressional action. *See* Tribe, *American Constitutional Law*, Section 6-2 (Foundation Press (1978)). This case does not involve a situation in which no express congressional action has been taken and the issue becomes whether the "negative implications" of the Commerce Clause allocation of commerce jurisdiction to Congress implicitly forbid state interference. Rather, this case involves the adjudication of a claim of direct preemption of local action by express congressional action pursuant to the Commerce Clause. The question is simply whether a conflict exists between the two schemes, in which case the congressional policy *must* prevail. Professor Tribe aptly described the difference in congressional action:

> So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action—and the validation of congressionally authorized state or local action—flow directly from the substantive source of the congressional action coupled with the supremacy clause of article VI; such cases may pose complex questions of statutory construction but raise no controversial issues of power. Those issues are raised, however, when state power is said to be ousted not because of specific conflict with what Congress has *done* but because of negative implications thought to flow from what Congress *might* have done. Such ouster of state authority because of "dormant" congressional power of course lies at the heart of most commerce clause litigation.

[Tribe, *supra*, section 6-23; footnote omitted, emphasis in original.]

Clearly, the California court has misapplied the law established by this Court in *Lafayette, Boulder,* and *Town of Hallie.* In this Court's recent decision in *Town of Hallie,* the conflict that existed between the municipal activity and the federal antitrust laws involved an alleged monopoly in sewage treatment services and an alleged tying arrangement between these services and the collection and transportation of sewage. This conflict was sufficient to invoke *Parker* immunity analysis. *See Town of Hallie,* 53 L.W. at 4419. The conflict with federal antitrust law is equally as great in this situation in which a municipality is fixing the rents chargeable by private landowners.

A modified commerce clause-type test to determine whether a municipal ordinance conflicts with the Sherman Act is unjustified and departs with the standard established by this Court. Such a test is not necessary to determine whether a municipal ordinance facially conflicts with federal antitrust law and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). In reality, although the test below is couched in terms of substantive "conflict" between federal and municipal law, the California court, by creating this test, has attempted to overrule this Court's opinions in *Lafayette* and *Boulder* and to uphold the argument, expressly rejected in both those cases, that municipal action in pursuit of local social policy enjoys an implied exclusion from the antitrust laws.

Therefore, because the test created by the California Supreme Court significantly departs from the precedent established by this Court, we urge this Court to note probable jurisdiction to decide this case on the merits.

CONCLUSION

The rent control ordinance enacted by the city of Berkeley clearly constitutes price-fixing, an activity that, in all cases, is *per se* invalid under the Sherman Act. Price-fixing undoubtedly conflicts with federal antitrust law and is therefore preempted by Sherman under the Supremacy Clause.

Unlike a sovereign state, the city of Berkeley is not entitled to state action immunity under the *Parker* doctrine because they are not acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with municipal regulation. The city of Berkeley's Measure D, therefore, cannot escape preemption by the Sherman Act.

In this case, moreover, the nexus between the rent control ordinance and interstate commerce is sufficient to invoke federal jurisdiction under the Sherman Act. The impact of this anticompetitive municipal regulation on investors, financing and lending institutions, title insurance companies, brokers, real estate salespersons, contractors, building material suppliers and all other commercial industries related to the rental housing industry is widespread and substantial. California is not the only market affected by this municipal regulation.

Finally, because the test created by the court below departs significantly from earlier precedent established firmly by this Court in *Lafayette, Boulder,* and *Town of Hallie,* it should be overturned by this Court. Due to the foregoing considerations, the California Association of Realtors respectfully urges this Court to grant plenary consideration to this very important case.

Respectfully submitted,

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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, ET AL.,
Appellants,

v.

CITY OF BERKELEY, ET AL.,
Respondents.

On Appeal from the Supreme Court of California

BRIEF AMICUS CURIAE OF THE CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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25pp

TOPICAL INDEX

	Page
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. FAILURE TO AFFORD PLENARY CONSIDERATION TO THIS APPEAL WILL HAVE DISASTROUS EFFECTS IN THE LOWER COURTS	4
II. PREEMPTION BY THE SHERMAN ACT IS A QUESTION OF COMPETITIVE IMPACT, RATHER THAN MUNICIPAL POLITICS	6
III. IF MUNICIPAL PRICE FIXING DOES NOT CONFLICT WITH THE SHERMAN ACT, WHAT DOES?	9
A. Congress Intended to Preempt Municipal Anticompetitive Acts	11
B. Rent Control Definitionally Obstructs the Policies and Objectives of the Sherman Act	14
IV. VINDICATION OF THE SUPREMACY OF CONGRESSIONAL COMMERCE ENACTMENTS HEREIN POSES NO THREAT TO FEDERALIST PRINCIPLES	17
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
CASES:	
Albrecht v. The Herald Co., 390 U.S. 145 (1968)	15
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)	15
California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	7,8
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	3,6,7, 9,10,13, 14,18
Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913 (1976)	6
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	3,6,9, 13,14, 18,19
Davis v. Elmira Savings Bank, 161 U.S. 275 (1896)	15
Edgar v. MITE Corp., 457 U.S. 624 (1982)	5
Fisher v. City of Berkeley, 37 Cal.3d 644 (1984)	*passim*
Hicks v. Miranda, 422 U.S. 332 (1975)	5
Hill v. Florida, 325 U.S. 538 (1945)	15
Hines v. Davidowitz, 312 U.S. 52 (1941)	7,15
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	15
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)	5
McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819)	15
Nash v. Florida Industrial Comm., 389 U.S. 235 (1967)	15
Nebbia v. New York, 291 U.S. 502 (1934)	9
Parker v. Brown, 317 U.S. 341 (1943)	9,12,17, 18
Town of Hallie v. City of Eau Claire, No. 82-1832, ___ U.S. ___, 53 U.S.L.W. 4418 (1985)	3,4,6, 9,18
United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944)	4
U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	8
U.S. v. Topco Associates, Inc., 405 U.S. 596 (1972)	8

	Page
STATUTES AND BILLS:	
15 U.S.C. section 1 et seq.	*passim*
P.L. 98-544	4,11,13, 19
California Health & Safety Code section 51600	16
H.R. 2981, 98th Cong., 1st Sess. (1984)	12
H.R. 5573, 98th Cong., 2nd Sess. (1984)	11
H.R. 5992, 98th Cong., 2nd Sess. (1984)	11
H.R. 6027, 98th Cong., 2nd Sess. (1984)	11
S. 1578, 98th Cong., 2nd Sess. (1984)	11
SECONDARY AUTHORITY:	
Bay Area Council, *Rental Housing in California: Obstacles & Opportunities*, April, 1983	16
Tribe, *American Constitutional Law* (Foundation Press, 1978)	8
U.S. House of Representatives, Judiciary Committee, Report No. H.R. 98-965, 98th Cong., 2nd Sess. (1984)	9,12,13, 19
U.S. Senate, Judiciary Committee, Official Proceedings June 30, 1982	17

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.2, the California Apartment Association respectfully submits this brief amicus curiae in support of appellants, Alexandra Fisher, et al. Consent to the filing of this brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the clerk of this Court.

Amicus curiae California Apartment Association is a nonprofit association which represents the interests of the more than 352,000 owners of residential rental property in California. These owners, a majority of whom have their savings invested

in modest holdings of four units or less, provide shelter for over 4 million households in the State of California. A great many of these owners have seen in recent years the imposition without state sanction of severe local rent controls which have devastated their investment-backed expectations of both profitability and marketability. As a result, the expansion of this industry—and of the housing supply and other industries related thereto—has been virtually frozen in rent-controlled California cities. Growth has also been substantially impaired in uncontrolled areas due to the reasonable fears of investors that increasing numbers of politicians will discover that the cheapest way to subsidize housing costs and thereby curry the favor of renter constituents is to abandon the free market in favor of price regulation.

The California Apartment Association has played a principal role below in the presentation of the antitrust challenge now made in this Court, and appears herein to urge the Court to acknowledge jurisdiction herein and afford plenary consideration to the sweeping revisions of federal law enunciated by the state court below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The clear intent of Congress and the rule repeatedly propounded by this Court is that, unless engaged in "state action"—an implementation of a clearly articulated and affirmatively expressed *state* policy of displacing competition with regulation in the affected industry—local governments are subject to the federal antitrust laws. This case presents for review the first decision known to amicus curiae which significantly delves into the issue of whether price-fixing conduct which admittedly would be *per se* actionable if engaged in by private parties is somehow validated *because* of the governmental status of the price-fixing participants.

The opinion below (Appendix A to the Jurisdictional Statement) would cause great confusion and conflict as *stare decisis*. Not limited in its reasoning to rent controls or even to the application of the antitrust laws, it strikes deep at the heart

of long-settled principles of preemption. It finds, strikingly, that local action which obstructs the policies and objectives of express congressional action nonetheless is not preempted. Rather, in effect, it holds that local action may itself preempt that federal law by making it a crime to engage in the independent pricing encouraged by federal law. This ability of cities, without state policy backing, to reach out and fix prices in the market is not limited to rents, but could be applied to any and all commodities and services the city chooses to control.

What remains of the basic principle enunciated by this Court of insulating national economic policy from "parochial interests," if a city is free to adopt a totally controlled economy as a "reasonable" pursuit of its "health, safety and welfare" objectives? If the public welfare objective *is* the involuntary lowering and freezing of price, what means could be "less intrusive" upon the federal policy favoring price competition, and still accomplish the objective of freezing and stabilizing prices? None, obviously, which is why we respectfully suggest that the opinion below is nothing less than an effort to undermine, circumvent and, in effect, overrule this Court's rulings in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Company, Inc. v. City of Boulder*, 455 U.S. 40 (1982); and *Town of Hallie v. City of Eau Claire*, No. 82-1832, ____ U.S. ____, 53 U.S.L.W. 4418 (1985).

According to our research, California is the only state in the Nation where, despite the fact that the adherents of rent control have failed to obtain state action authorizing local rent control, some cities persist in controlling rents under a "home rule" police power such as that found inadequate in *Boulder, supra*. The court below has acknowledged that "California has no rent control statute." 37 Cal.3d at 655, Appendix A at A-6. The question presented and needful of plenary consideration is whether some new exemption or immunity flows automatically from municipal status, whether one attaches to it the euphemisms "municipal rule of reason," "public welfare defense," or some other.

With this Court's recent decision in *Town of Hallie v. City of Eau Claire*, No. 82-1832, ____ U.S. ____, 53 U.S.L.W. 4418 (1985), and the Congress' recent enactment of the Local Government Antitrust Act of 1984, P.L. 98-544, there has begun to evolve a clarity and consistency in this area of the law that is ignored by the court below.[1] Unless affirmatively addressed by this Court, the opinion below in this case threatens, in its ill-perceived need to "wander off the map and travel cross country without the benefit of trail or compass," 37 Cal.3d at 663, Appendix A at A-15, to muddy those waters again. *All* parties to this controversy agree, it would seem, that uncertainty in this area of the law is destructive to the interests of both federal and local objectives as well as, we submit, the rights of private competitors to be free from predatory municipal activity. We respectfully suggest that the time to address the other half of the question, that of substantive conflict with the Sherman Act, has arrived.

ARGUMENT

I. FAILURE TO AFFORD PLENARY CONSIDERATION TO THIS APPEAL WILL HAVE DISASTROUS EFFECTS IN THE LOWER COURTS

In its opinion below the California Supreme Court has declared sweeping revisions to the Constitution and laws of the United States to save from certain preemption the parochial interests of the City of Berkeley. In one bold move the court below has discovered constitutional truths that have thus far evaded this Court, despite the substantially greater experience and authority traditionally enjoyed by this Court in that role. The Supremacy Clause, we are told, does not operate to preempt municipal anticompetitive action notwithstanding the absence of sovereign state action. To the contrary, the parochial municipal policy may shoulder aside the Nation's economic policies embodied in the Sherman Act—the "utmost extent" of congressional commerce power, *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 558 (1944)—provided the

[1] Indeed, the California court failed even to acknowledge the 1984 Congressional action. *cf.* 37 Cal.3d at 672, Appendix A at A-27.

local program is "even-handed," and its challengers cannot demonstrate to the court a "less intrusive" yet equally "effective" means of accomplishing the local goal.

The linear approach of direct preemption used by this Court where an express congressional commerce act is obstructed by a local act is now replaced, we are told, with a variation upon this Court's "negative implications" test heretofore used only in cases of local regulation of a commerce aspect *upon which Congress has not yet acted. See, e.g., Edgar v. MITE Corp*, 457 U.S. 624 (1982); *Kassel v. Consolidated Freightways Corp*, 450 U.S. 662 (1981). But even *that* test apparently favors federal policy too much in the view of the California court, for balancing federal interests against local policy is pernicious and dispensable; courts are incompetent to balance local social policy against federal economic policy (opinion below, 37 Cal.3d at 675) and we should not suffer "judicial second-guessing of legitimate local policies." *Id.*, at 675, n.28. The solution offered by the California court is a rule that would in virtually all cases hold municipal policy absolutely "supreme" to federal law. We respectfully submit that judicial second-guessing of *federal* economic policy is the result ultimately reached by the California court.

Approval by this Court of such radical changes to the constitutional law of preemption would arguably be the most historic—and regrettable—commerce decision ever issued by this Court. All of the lower courts of this Nation would be required to totally readjust their view of Congressional power under the Commerce Clause in light of the new impotence imposed thereon by this radical opinion, which reaches not merely rent control nor merely municipal antitrust issues, but indeed the very heart of federalism and the commerce power, and all the varied manifestations thereof.

Yet it is too late to avoid such a result by any means other than plenary consideration of this appeal. Under the rule of *Hicks v. Miranda*, 422 U.S. 332 (1975), summary disposition of this case would *necessarily* be *stare decisis* as a decision on the merits of this appeal.

The choice facing this Court in this appeal is clear: either reject the erroneous California decision by giving plenary consideration to the issues raised in this appeal, thereby continuing the vitality and meaning of the *Boulder* tests of clear articulation and affirmative expression, or summarily dismiss this appeal, effectively adopting the California Supreme Court's opinion as its own. If the latter course is taken it will be abysmally obscure to the Nation's trial courts just what this Court intended to make law by its summary action. *See Colorado Springs Amusements, Ltd. v. Rizzo,* 428 U.S. 913, 916-922 (1976) (Brennan, J., dissenting). Such confusion on such a pervasive and important range of issues should not be invoked without good cause.

II. PREEMPTION BY THE SHERMAN ACT IS A QUESTION OF COMPETITIVE IMPACT RATHER THAN MUNICIPAL POLITICS

The political status of municipal actors, now unquestioned to be "persons" under the Sherman Act, *Lafayette,* 435 U.S. at 396, is now well-settled as to the state action exemption. As this Court so recently stated in *Town of Hallie, supra:*

> Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 412 (1978) (opinion of BRENNAN, J.). Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.,* at 413. [*Town of Hallie, supra,* 53 U.S.L.W. at 4419.]

Further, where municipal regulation of private market participants is involved, active state supervision of the scheme must be shown. *Id.,* 53 U.S.L.W. at 4421, n.10. As the California Supreme Court has acknowledged herein, "California has no rent control statute," Opinion below, 37 Cal.3d at 655, Appendix A at A-6; "It is uncontradicted that the California Legislature has not directly spoken on the subject of rent control, much less 'clearly articulated and affirmatively expressed' any policy favoring local ordinances such as Berkeley's." 37 Cal.3d at 714, Appendix A at A-82 (Lucas, J., dissenting). The market restraint, then, stands before this Court bereft of a single shred of sovereign policy to defend it; rather, its defense turns exclusively upon a presumption created by the court below that the municipal status of the price-fixer transforms the act into something other than price-fixing.

The status of cities as such, in *preemption* analysis, is irrelevant. Here we have an express Congressional enactment under the Commerce Clause. Indeed, Congress "exercise[d] all the power it possessed" under the Commerce Clause with the Sherman Act. *California Retail Liquor Dealers Assn. v. Midcal Aluminum,* 445 U.S. 97, 111 (1980). In *Lafayette,* this Court noted that the Congress intended to establish competition as "the polestar" of economic affairs, shielded from "the vagaries of the political process," so that free enterprise could flourish "without regard to the amount of influence it might have with local or state legislatures." *Lafayette,* 435 U.S. at 406-407. Yet the opinion below holds that by local political choice this national policy may be discarded with impunity, irrespective of the absence of state policy or involvement.

Well-settled law of preemption dictates that a local or state enactment conflicting with or obstructing express federal policy must be held invalid. The requisite conflict may be facial and obvious, or it may be demonstrated where, despite the lack of obvious conflict, the state or local program tends to thwart the objectives or policies of federal law. *Hines v. Davidowitz,* 312 U.S. 52 (1941). As stated by Professor Laurence H. Tribe:

> [S]tate and federal laws need not be contradictory on their face for the latter to supersede the former: there are more subtle forms of actual conflict. Even if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie

> federal enactments. Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage. [Tribe, *American Constitutional Law* (1978) section 6-24.]

Here we have a Congressional Act specifically designed to foster free market activity and particularly aimed at freedom in pricing. As this Court stated in *Midcal, supra:*

> The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.
>
> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S.596, 610, 892 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972) . . . .

[445 U.S. at 110-111.]

The importance of independent price-setting to that policy is beyond dispute:

> Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. [*U.S. v. Socony-Vacuum Oil Co., supra,* 310 U.S. at 226 n.59.]

In contrast, we have an ordinance by the city of Berkeley which makes "the setting of price by free market forces" a *crime.* How could one conceivably say no "conflict" exists? For the California Supreme Court, the answer to the question is to reintroduce "status" into the *substantive* issue of conflict. This Court and the Congress having both declared that municipal status alone cannot confer *exemption,* the lower court herein has confused the *preemption* issue by indulging the pretense that

"conflict" does not exist so long as the ordinance passes its new-found *political* test. The *economic* issues of antitrust analysis are seemingly irrelevant in finding conflict —instead, whether price-fixing conflicts with the "Magna Carta of free enterprise" is to be determined upon *political* issues of municipal status, health and welfare objective, and so forth. Stripped of its pretensions, this new test of "conflict" is in reality a localized *Nebbia v. New York,* 291 U.S. 502 (1934), warmed over—and totally insensitive to the economic policy of the Sherman Act.

The question whether the Congress intended to tolerate conduct by municipalities which would be unlawful if engaged in by private parties has been answered by the Congress itself—in the negative. Congress has refused to grant the blanket exemption sought by the cities following this Court's *Boulder* decision. *See generally* House Judiciary Committee Report on the Local Government Antitrust Act of 1984, H.R. Report 98-965, 98th Cong., 2d Sess. (1984).

III. IF MUNICIPAL PRICE-FIXING DOES NOT CONFLICT WITH THE SHERMAN ACT, WHAT DOES?

The essence of the line of cases running from *Parker v. Brown,* 317 U.S. 341 (1943), through *Lafayette* and *Boulder* to *Town of Hallie* is that *states* are permitted to make the choice to displace competition with regulation, but cities are not. The reasoning is straightforward enough: we could not have an effective national economic policy if each city and county had its own insular economic system, ranging from laissez-faire capitalism to the controlled economy idealized by some California municipal activists. As this Court succinctly stated in *Lafayette:*

> In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." [435 U.S. at 412-413 (footnote omitted; citations omitted).]

This court also pointed out in *Lafayette* that the test enunciated therein struck a desirable balance between state and federal interests because it

> "[P]reserv[ed] to the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." [*Id.*, at 415-416.]

Now the California court has devised a test which, unless denied *stare decisis* effect by plenary consideration herein, radically changes the balance between federal and municipal power. In the total absence of any *state* policy to command federalist deference, even the most egregiously anticompetitive local experiment—e.g., an across-the-board price rollback and freeze on *all* consumer goods and services—is exempt from antitrust analysis so long as the private litigant cannot prove an equally effective yet "less intrusive" means is theoretically available. Yet, assuming that "effective" contemplates "cost-effective," as it necessarily must, what could be more cost-effective than printing an ordinance and thereby conferring upon voters a short-term savings of hundreds of thousands or millions of dollars in the aggregate, with no cost beyond typing the ordinance and signing it? Here, if the objective is less expensive housing, the familiar means of direct subsidy and supply is "less intrusive." This was argued before the court below but was ignored by the majority—perhaps because, although quite "effective," it takes money. *See* opinion below, 37 Cal.3d at 718, Appendix A at A-86 (Lucas, J., dissenting). The court below has fashioned a test that will exempt from antitrust scrutiny all forms of municipal price-fixing, for *nothing* so effectively gives voters the desired budgetary relief as simply making it a crime to operate a business at prices producing profit margins above the survival level—which in essence is the result of the price-fixing ordinance before this Court.

A. Congress Intended to Preempt Municipal Anticompetitive Acts.

Until recently, the question of whether and under what circumstances Congress intended to preempt the anticompetitive acts of *cities* has been left to the perceptive capacities of this Court. Congress has recently demonstrated once again the accuracy of those predictive powers by the enactment of the Local Government Antitrust Act of 1984 (P.L. 98-554). That Act abolished the troublesome treble damages remedy as to most local entities, while reaffirming and leaving intact the injunctive and other remedies for municipal transgressions of the Sherman Act. Further, the legislative history of that Act clearly reveals that the Congress considered and rejected a number of substantive municipal exemptions, including some strikingly similar to the "public welfare defense" judicially fabricated below.[2]

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[2] For example, H.R.5992, 98th Cong., 2d Sess., Sec. 3 (1984) would have provided that, ". . . the antitrust laws shall not apply to official conduct of a local government reasonably undertaken to protect or provide for the public health, safety or welfare." In contrast, the opinion below seeks to establish a "public welfare defense" (37 Cal.3d at 673, Appendix A at A-28) based upon ". . . a test that is sufficiently flexible to accommodate the interest of local government in promoting public health, safety and welfare programs or regulations." 37 Cal.3d at 674, Appendix A at A-29. This test, like the rejected House proposal of H.R.5992, ". . . encompasses all local actions rationally related to promotion of local health, safety and welfare." *Id.*, at 675, Appendix A at A-31.

In parallel to the House's consideration and rejection of the "public welfare defense" set forth by H.R.5992, *supra*, the Senate considered and rejected S.1578, 98th Cong., 2d Sess. (1984). As reported with amendment on June 15, 1984, Section 2a of the Senate proposal would have provided that the *damage* provisions of the Clayton Act (15 U.S.C. Secs. 15, 15a and 15c), ". . . shall not apply to any law or other action of or official action directed by, a city, . . . or other general function unit of local government in the exercise of its regulatory powers. . . . in a manner designed to ensure public access or otherwise to protect the public health, safety, or welfare . . . ." Of similar or broader breadth was the general exclusion offered by H.R.5573, 98th Cong., 2d Sess. (1984), which would have excluded from the application of *all* federal antitrust laws the actions of local government "[I]n the exercise of its regulatory powers . . . where such law or action is valid under state law . . . ." As with S.1578, *supra*, H.R.5573 contained the limitation that *proprietary*

(footnote continues)

Unlike the 51st Congress which enacted the Sherman Act without leaving any express record of intent toward or even consideration of municipal action, the 98th Congress has left a relatively straightforward record of its consideration and rejection of substantive changes in the definition of conduct offending the antitrust laws. The House Judiciary Committee Report to the Committee of the Whole House on H.R.6027, H.R.Rep. 98-965, 98th Cong., 2d Sess. (1984), recites in some detail the proposals placed before the Congress as well as the vast and varied testimony presented to them on the issue. That Report is by no means uncertain as to whether Congress had intended to modify the substantive law:

> H.R.6027 would in no way limit the antitrust immunity for States that the courts have recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent decisions interpreting the "state action" doctrine. *The bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law. For example, there will be no change in the substantive antitrust law applicable to local governments, or persons with whom they deal, in suits for injunctive relief under Section 16 of the Clayton Act, or in enforcement actions by the Department of Justice or the Federal Trade Commission under other statutory provisions.* [*Id.*, at 2 (emphasis added).]

The Report also discusses the urgings for a "municipal rule of reason," strikingly similar to the rule declared below, which was described by Professor Thomas Campbell as follows:

> When a court is presented with a restriction on competition, the Court would engage in a less restrictive alternative analysis * * * [which would] simply require the court to ask, could the unit of local government have achieved its safety, its health, its public welfare objective in a way less retrictive [sic] of the Federal interest in competition, less harmful to the consumer. [*Id.*, at 16.]

(footnote continued)

activities would not be exempted, nor would activities which would be actionable even if state action. This latter limitation was the sole exception to a blanket exclusion that would have been provided by H.R.2981, 98th Cong., 1st Sess. (1983), which would recognize authority vested in the local unit "by any law," presumably reaching not only general home rule statutes and constitutions but even the common law of police power of municipalities.

Finally, the Report reveals the Congressional reasoning which led to the rejection of wholesale substantive exclusions for municipal acts:

> The Subcommittee did not adopt the concept of a ban against private actions aimed at municipalities and their officials. The role of "private attorneys general" in the antitrust enforcement scheme remains central. *If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.* [*Id.*, at 18 (emphasis added).]

It is fair to state, then, that the policy considerations underlying the lower court's opinion, and particularly a "health, safety, welfare" defense limited only by a "less restrictive" means test, have been carefully considered by Congress, and a Congressional judgment has been made that such sweeping changes in substantive application of the laws were not warranted at this time.

Congress by its actions culminating in Public Law 98-544 sent a clear message confirming that it intended generally to preempt anticompetitive municipal conduct lacking a clear state policy foundation. In so doing, it is clear that Congress intended that the existing body of substantive antitrust law continue undisturbed in its application and careful evolution in the federal courts. That body of law contains but two significant components unique to the municipal actor: the *Boulder* exemption, clearly unavailable here, and the as yet unrefined caveat of *Lafayette*'s footnote 48, restated without amplification in *Boulder*'s footnote 20:

> "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." [435 U.S. at 417, n.48; 455 U.S. at 56, n.20.]

This footnote provides the scant soil within which the opinion of the lower court herein is rooted. Typical of the confusion surrounding that dictum, the California court misconstrued this Court's caution about blanket assumptions into a blanket assumption of its own:

> "Anticompetitive conduct by a municipality in exercise of its legitimate police power is indeed of a 'different complexion' than similar conduct engaged in by private business enterprises . . . ." [37 Cal.3d at 663.]

To sanction the conclusion of the lower court would, in this Court's words, "wholly eviscerate" this Court's precedents. *Boulder*, 455 U.S. at 56. For, if a city may fix prices of any and all goods related to "health, safety and welfare" without fear of antitrust scrutiny, what is left of *Lafayette*'s policy protecting federal economic objectives from "parochial" local policy? Can one cut the very heart out of the Sherman Act and pretend it retains vitality? We think not. Whatever may eventually blossom from the concept of "different complexion," the "hard core" of antitrust policy—the prohibition against manipulating the independent setting of price—*must* be kept inviolate or nothing of substance will remain to prevent "[t]he serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws," *Lafayette*, 435 U.S. at 412-413.

B. Rent Control Definitionally Obstructs the Policies and Objectives of the Sherman Act.

The principal objective of the Sherman Act is to prohibit the restraint of free-market price determination and competition. The Berkeley ordinance obstructs the implementation of the procompetitive policies and objectives of the Sherman

Act. State or local enactments are preempted where the state or local program tends to thwart the objectives or policies of federal law. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Under the *Hines* approach to preemption, it is unnecessary to find an actionable combination or conspiracy to find preemption; it is enough that the *object* and *effects* of the scheme be of the kind sought to be controlled by the Sherman Act. This is because a local act is preempted by Congressional action not only where it calls for violation of the *letter* of federal law, but also where the *result* it obtains "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. *Jones v. Rath Packing Co., supra*, 430 U.S. 519, 526 (1977). *See also Nash v. Florida Industrial Comm.*, 389 U.S. 235, 239 (1967); *McCulloch v. Maryland*, 4 Wheat. 316, 436, 4 L.Ed. 579, 609 (1819); *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896); *Hill v. Florida*, 325 U.S. 538, 542-543 (1945). Nor does some "different complexion" attach to this price-fixing scheme to save it from preemption. Once divested of the benevolent aura of its municipal actors and subjected to economic analysis, it becomes clear that virtually all of the economic harms which flow from private price-fixing predictably result from this scheme as well. To be sure, the one central characteristic that is distinct from the typical price-fixing scheme is that prices are *suppressed* rather than *supported*, which at first glance produces the predictable reaction that it is innocuous. Yet, as this Court well knows, antitrust policy and analysis is not so facile or unidimensional as to stop there. Congress' policy concerns are not merely limited to or satisfied by the containment of price in any one commodity in any one market. That is because price, as the "central nervous system of the economy," impacts upon all other aspects of the instant commodity or service transaction, and in turn these transactions in the aggregate impact upon the markets for related goods and services. Maximum prices, as well as price floors, have accordingly been repeatedly condemned by this Court as *per se* violations. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Albrecht v. Herald Co.*, 390 U.S. 145 (1969).

The California Legislature has acknowledged the difficulty in attracting investment capital into rental housing in California: California Health and Safety Code Section 51600 declares (as a basis for the state's entry into mortgage financing) that "for reasons of prudent investment policy, private lending institutions are not making mortgage financing available for rental housing developments in California because of the perceived risks such loans entail." Chief among those risks is the threat of local rent control impairing debt service and creditor security. *See*, Bay Area Council, *Rental Housing in California: Obstacles and Opportunities*, April 1983. (Appendix H.) Many other economic studies and publications echo, fairly unanimously, the conclusion that rent controls stifle new supply, encourage deterioration of existing housing stock, and produce negative "ripple effects" in related markets. *See generally* Justice Lucas' thoughtful dissent below, 37 Cal.3d at 715-716 and materials cited therein. That rent controls disrupt normal market operation not only in housing but in related interstate markets as well is too clear to require elaboration.

Rent control definitionally restrains the setting of competitive pricing in a free market. That it would constitute actionable conduct under the Sherman Act if engaged in by private parties is unquestionable. The *result* is in conflict with the policies of the Sherman Act. It is *preempted* thereby even in the absence of a liability-imposing conspiracy for preemption turns upon the obstruction of policy objectives, and not necessarily violation of the letter of the law. As it was explained in this context to the U.S. Senate Judiciary Committee by noted antitrust authority Professor Phillip Areeda:

> It is exceedingly important to see that neither antitrust liability nor antitrust damages are necessary to hold, in any particular case, that the federal antitrust regime applies in preference to a federal or state regulatory effort. This is perfectly obvious at the federal level where, for example, a federal court may "invalidate" the regulation or decision of a federal agency because it interferes with competition more than Congress intended and is therefore beyond the authority of the officials in question. Such conclusions are routinely reached without any finding that the federal agency or its officials have violated the antitrust laws or are liable for antitrust treble damages.

> What is often overlooked is that state or local regulation interfering unduly—by whatever standard you choose—with federal policies favoring competition can also be invalidated without any finding of antitrust liability or imposition of treble damages. In its 1980 *Midcal* decision, the Supreme Court affirmed a state court injunction preventing enforcement of a California wine-pricing statute. No antitrust liability was involved, nor was any necessary to invalidate the state-imposed program found to be inconsistent with antitrust law. [Testimony of Phillip Areeda, Official Proceedings of the United States Senate Judiciary Committee, June 30, 1982.]

Municipal price-fixing is preempted by the Sherman Act where it is not entitled to a state's *Parker* exemption, irrespective of whether a plaintiff can establish punishable "combination or conspiracy": *results* not *process* define whether obstruction and "conflict" exist.

IV. VINDICATION OF THE SUPREMACY OF CONGRESSIONAL COMMERCE ENACTMENTS HEREIN POSES NO THREAT TO FEDERALIST PRINCIPLES

Much commentary by municipal law officers and their supporters on the general topic of municipal antitrust has focused upon the supposed federalist status of cities and the hue and cry proclaiming that the inability to defy federal economic policy will destroy the ability of local governments to function.

Both claims sorely miss the mark. This Court has plainly stated that cities enjoy no sovereignty of their own but only that derived from their sovereign states. Those true sovereigns also wield the power and discretion to exempt their creations from antitrust proscriptions simply by making an express policy choice to permit anticompetitive regulation in the particular area of activity. The true intergovernmental tension here—the real political power play—is intrastate, between city and state. The hidden heart of the cities' complaints is that their respective states have not in all cases authorized the excesses of regulatory adventurism in which many (particularly in our own politically tumultuous state of California) have become accustomed to indulging.

"States' rights" are not under attack. In *Parker* a price-fixing scheme adopted by state government was held not to conflict with the Sherman Act since Congress did not apparently intend to require *states* to comply with the antitrust laws in the operation of their own programs. *Lafayette, Boulder,* and *Town of Hallie* have not abridged this deference to state policy; each case has inquired whether the conduct in question involves "a state's control over its officers and agents," *Parker,* 317 U.S. at 351, by looking for sovereign action by the state itself or "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Boulder,* 455 U.S. at 52. The principles enunciated by this Court and urged to be applied herein do not offend "states' rights," as is sometimes loosely said. Rather, they deny cities the "right" as insular self-guiding units to thwart federal policy without some clear indication that a *state* policy is at work. The *states* have voiced no strong objection to such a formulation. Indeed, twenty-three states filed a brief amicus curiae in *Boulder* in favor of petitioner, urging that a state policy requirement be retained. *Boulder, supra,* 455 U.S. 40, 43, 53, n.16. Further, in Congress' recent proceedings culminating in the Local Govern-

ment Antitrust Act of 1984 (P.L. 98-544), the National Conference of State Legislatures sent a representative to Congress to urge retention of the *Boulder* focus on *state* policy making.[3]

The vindication of Congress' economic policies embodied in the Sherman Act does not constitute an affront to the sovereign states themselves, for Congress has wisely left to them the power and discretion to adopt polices displacing the Sherman Act. The rights of cities are not in this context constitutional: they are political. They do not enjoy the independent sovereignty of a state, yet wield significant political power within their state systems, particularly where acting collectively and particularly where a matter of public importance and interest is at stake. The political mechanisms exist, and *work,* to ensure that the dire predictions offered by the champions of municipal omnipotence cannot possibly come to pass. The suggestion that cities cannot properly govern under the shadow of the Sherman Act insults the states as sovereigns—it is the cities, not Congress, who refuse to acknowledge that the state legislatures are competent, sensitive, and trustworthy policymaking bodies.

[3] That representative presented the states' position as follows:

> NSCL's [sic] most important suggested proviso for federal legislation is that the actions of a municipality or county should be eligible for immunity only if they are based on State law. The *Boulder* decision expressly left to the States the power to immunize local activities from federal antitrust liability. NCSL is not in favor of rolling back this portion of the opinion because of our view that in a federal system of dual sovereigns, immunization decisions properly belong to the States and because of our view that this aspect of the *Boulder* decision will not result in an undue burden on local governments. Such a proviso recognizes that local governments are not federal agencies or a third sovereign form of government." Prepared Statement of Dick Hemstad (notation omitted) at Mar. 29, 1984 hearing at p. 3. [Judiciary Committee report on H.R. 6027, H.R. Report No. 98-965, 98th Cong., 2d Sess., August 8, 1984, p. 13, n.19]

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CONCLUSION

This Court and the Congress have, with significant effort, made great strides in resolving the "state action" exemption and the remedies available where that exemption is unavailable. What remains as a puzzle to public and private sectors alike is the question whether political status supersedes economic analysis in determining responsibility for municipal action conflicting with the Sherman Act's policy and objectives. The instant action not only presents that question in a straightforward, dispositive fashion, but it does so compellingly due to the hazards the opinion below presents to the orderly administration of justice.

This Court performs an essential constitutional role in providing uniformity among the lower courts in constitutional matters. It is respectfully submitted this role cannot be served in the best traditions of this Court by permitting sweeping constitutional changes to be made by an inferior court which is by its own admission forced "to wander off the map and travel cross country without the benefit of trail or compass." Opinion below, 37 Cal.3d at 663, Appendix A at A-15. To allow that opinion to stand would make a Pied Piper of that court, luring all lower courts "off the map" of established *stare decisis* as well. It is respectfully urged that this Court afford this matter plenary consideration so that the important federal questions raised herein may become clarified rather than further confused.

Respectfully submitted,

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No. 84-1538

IN THE

Supreme Court of the United States

October Term, 1984

ALEXANDRA FISHER, ET AL.,
Appellants,

v.

CITY OF BERKELEY, ET AL.,
Respondents.

On Appeal from the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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TOPICAL INDEX

	Page
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	iv
BRIEF AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Substantial Sectors Of Interstate Commerce Are Impacted By "Local" Price Fixing	3
II. Respondents' Ordinance Facially Conflicts With The Sherman Act	5
III. Rent Control Is Inevitably In Conflict With The Policy And Objectives Of The Sherman Act	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	PAGE
Albrecht v. The Herald Company, 390 U.S. 145, 150 n.6 (1968)	6
Arizona v. Maricopa County Medical Soc'y., 457 U.S. 332 (1982)	8
California Retail Liquor Dealers' Association v. Midcal Aluminum, 445 U.S. 97 (1980)	7
City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 412-413 (1978)	3
Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896)	8
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	5
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	6
Federal Trade Commission v. Beech-Nut Packing Co., 321 U.S. 707 (1944)	5
Fisher v. City of Berkeley 37 Cal.3d 644 (1984)	passim
Hill v. Florida, 325 U.S. 538, 542-543 (1945)	8
Hines v. Davidowitz, 312 U.S. 52 (1941)	7
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	8
McCulloch v. Maryland, 4 Wheat 316, 436, 4 L.Ed. 579, 609 (1819)	8
McLain v. Real Estate Board, 444 U.S. 232, 246 (1980)	5
Midcal Aluminum v. Rice, 90 Cal.App.3d 979, 982 (1979)	7
Nash v. Florida Industrial Com., 389 U.S. 235 (1967)	8
National Society of Professional Engineers v. U.S., 435 U.S. 679 (1978)	7
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968)	6
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)	6
Simpson v. Union Oil Co., 377 U.S. 13 (1964)	6
United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944)	5
United States v. Parke, Davis & Co., 362 U.S. 29 (1959)	5, 6
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	7

	PAGE
STATUTES AND ORDINANCES	
15 U.S.C. Section 1 et seq.	passim
29 U.S.C. Section 151 et seq.	8
California Health and Safety Code Section 51600(d)	4
Berkeley Ordinance 5261-N.S.	passim
MISCELLANEOUS	
Bay Area Council, *Rental Housing in California: Obstacles & Opportunities*, April 1983	4
Katz & Rosen, *The Effects of Land Use Controls on Housing Prices*, Working Paper 90-13, Center For Real Estate and Urban Economics, University of California, Berkeley	4
President's Commission on Housing, *Government Regulation and the Cost of Housing*, (1982)	4
Tribe, *American Constitutional Law*, (Foundation Press, 1978)	8

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Pursuant to Rule 36.1 of the Rules of this Court, amicus curiae California Building Industry Association hereby seeks leave to file the attached brief in support of plaintiffs and appellants, Alexandra Fisher, et al. Counsel for respondents has declined to consent to the filing of this brief.

Amicus curiae is a statewide organization of over 4,700 companies which in the aggregate produce the majority of the housing construction in the Nation's most populous state. Counsel for amicus are familiar with the opinion below and the issues and proceedings in the lower court and believe that participation as amicus herein will be of assistance to the Court.

Amicus curiae California Building Industry Association is aware that this Court's Rule 36.1 indicates that the instant motion is not favored. The motion is made and leave hereby sought to appear in the jurisdictional phase, however, because in amicus' view this Court's decision whether to grant plenary consideration herein is at least as important to the interests of California housing market participants as would be the ultimate decision on the merits by this Court.

For reasons more fully set forth in the accompanying brief, a summary affirmance or dismissal of this appeal would have an immediate and adverse impact upon the interests of amicus and other housing market participants and related industries: because this action arises by appeal rather than certiorari, any such decision would necessarily be a disposition on the merits, and afforded *stare decisis* effect. Amicus is deeply concerned that such a result would open the floodgate of experimental market regulation by municipal officers around the Nation, and particularly in certain areas of California already known for aggressive and adventurous market manipulations. For these reasons amicus respectfully requests leave to file the attached brief urging plenary consideration of this appeal.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Amicus California Building Industry Association represents the interests of the builders of housing and commercial structures throughout the State of California. Central to the performance of that mission is the collection and dissemination of statistical and other information useful to the industry and representation of the industry's interests in various public fora including the courts.

The building industry in California experienced a downturn in rental housing "starts" in recent years despite a com-

monly acknowledged shortage of rental units. The practical experience of our members and financial industry data indicate that a major factor in this downturn is increasing distaste toward rental properties as an investment vehicle due to the proliferation of local rent controls impairing profit margins or even the capacity to service mortgage debt. As a result investors and their lenders are unwilling to risk the capital required to enter the marketplace and serve the consumers' ever-increasing demand for rental housing units.

The interest of amicus curiae herein is accordingly obvious: rent controls are not merely impeding growth, but actually imposing a *contraction* in a huge sector of the market for builders' products and services. As a result there is substantially less work for our members' employees as well as those providing goods and services to California builders. Because municipal rent controls in California are causing measurable injury to construction and related support industries, and because the situation threatens to worsen should the opinion below be accepted as the law, amicus curiae California Building Industry Association appears herein to urge this Court to accept jurisdiction of this appeal and afford plenary consideration to the issues presented thereby.

INTRODUCTION OF SUMMARY AND ARGUMENT

The lower court having totally avoided the issue of *Parker* exemption, 37 Cal.3d at 662, Appendix A at A-15, the principal issue before the Court is whether the political status of municipalities somehow affects the question whether a given course of conduct offends the policies and objectives of the Sherman Act. The opinion below apparently answers that question in the affirmative, holding that *irrespective of the economic results* a "public welfare"-directed enactment is presumptively immune from antitrust scrutiny.

The purpose of amicus herein is to demonstrate to the Court that in reality the types of harms addressed by the Sherman Act are being inflicted upon the economy by the practices of respondents and others engaging in "official" price-fixing at the municipal level. It is suggested that the existence in this particular market of demonstrable competitive harm with attendant adverse economic impacts establishes the necessity of

an *economics*-based test of whether municipal regulation "conflicts" with the Sherman Act: any other test, and particularly the test enunciated below, will certainly invite the exact "[s]erious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws." *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 412-413 (1978). This is particularly the case in light of the fact that the test is in no fashion limited to rent control but extends to *all* municipal price fixing.

ARGUMENT

I

SUBSTANTIAL SECTORS OF INTERSTATE COMMERCE ARE IMPACTED BY "LOCAL" PRICE FIXING

Statistical information prepared by the Construction Industry Research Board from U.S. Department of Commerce statistical models and data shows that without question there is a close and dynamic relationship between the superficially "intrastate" construction industry in California and numerous business entities outside of the state. For example, figures compiled by the Construction Industry Research Board show that in 1983 the *multifamily* segment of residential construction alone in California generated 2.8 billion dollars and employed 67,000 construction workers *in* California, in addition to employing 98,000 *non*-construction workers, of whom 55,000 worked and resided outside the state. Of those 55,000 interstate commerce-dependent jobs, 23,400 were in manufacturing; 9,700 in services; 9,200 in wholesale and retail trade; 4,200 in communications and transport; and another 8,500 in miscellaneous roles.

A substantial portion of the multifamily units are built as rentals. In 1978, it was 82% and in 1983, the last year for which figures are available, it was 64%. But even this level of rental production is unsatisfactory.

The California Legislature has acknowledged that *something* has driven investors away from rental housing in Califor-

nia. Reciting the basis for the state's entry into the business of mortgage financing, California Health and Safety Code section 51600(d) declares in pertinent part that,

> For reasons of prudent investment policy, private lending institutions are not making mortgage financing available for rental housing developments in California because of the perceived risks such loans entail.

A 1983 study by the Bay Area Council, a business-sponsored public affairs organization in the San Francisco Bay Area, found that the "prudent investment policy" and "perceived risks" which barred private mortgage funding from rental housing were spawned primarily by rent controls. That study, entitled *Rental Housing in California: Obstacles and Opportunities* (April, 1983) (reprinted in the Appendix to the Jurisdictional Statement herein as Appendix H) included a survey of 79 lending institutions representing hundreds of billions of dollars in capital. 82% of the lenders surveyed agreed with the statement, "Rent control is a threat to any new multifamily project in California, no matter where it is located"—indicating that the pall of rent control deters infusions of capital even in California cities not presently controlling rents. Half of those responding that they had had some experience lending monies on multifamily housing within the state stated they were unlikely even to consider lending on a multifamily project in a community currently controlling rents. (Appendix H at A-148.)[1]

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1. Another market perturbation caused by rent controls is increased demand pressure upon "entry level" resale residences, as would-be renters who cannot lease scarce premises are compelled to bid against one another for ownership of the most "affordable" resale properties, artificially driving *up* those prices. This is but another example of the dynamic nature of market economics, persistently misunderstood by those who wish to view respondents' price fixing in a vacuum. It is estimated that 18-20% of the cost of housing in the San Francisco Bay Area (which includes the city of Berkeley) is the result of local regulation. Katz and Rosen, *The Effects of Land Use Controls on Housing Prices*, Working Paper 80-13, Center for Real Estate and Urban Economics, University of California, Berkeley. This, however, is no longer a situation unique to overregulation-prone California, but is spreading nationwide. *See* Report of the President's Commission on Housing (1982), Chapter 13, "Government Regulation and the Cost of Housing."

From the foregoing it should be reasonably clear that the practice of local rent control has direct and substantial impacts in the interstate finance and construction materials and support industries. It also is clear that by rendering financing difficult and investment unattractive municipal price fixing creates market entry barriers just as effectively as would a private conspiracy to exclude new competitors, and deprives consumers of the new supply and the variety of decisions and approaches stimulated by the periodic entry of new players into a market. In other words, it is suggested that not only does rent control have a "not insubstantial effect" on very significant interstate industries "as a matter of practical economics," *McLain v. Real Estate Board*, 444 U.S. 232, 246 (1980), but further that aside from the superficial effect of lowering a consumer price it creates the type of economic displacement and havoc to which the prohibitions against price fixing and market entry barriers have long been applied.

II

RESPONDENTS' ORDINANCE FACIALLY CONFLICTS WITH THE SHERMAN ACT

On its face, the respondent's ordinance requires and coerces landlords to fix rents at levels dictated by respondent Rent Stabilization Board. The Board fixes the permissible rent levels and the landlord is required to agree to accept rents at those fixed levels or face various sanctions, including imprisonment, rent withholding, and damages. Berkeley, Cal., Ordinance No. 5261-N.S., Section 15(a)(1), 15(a)(2), 15(a)(4), 15(b), 19.

An "agreement" or "combination" can be shown where one party, although he wishes not to agree, acquiesces to the coercive demands of the other. Such is often the case in vertical price maintenance arrangements. *See Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1959); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373

(1911); *Albrecht v. The Herald Company*, 390 U.S. 145, 150 n.6 (1968); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968).

In *Perma Life Mufflers, supra*, this Court was primarily concerned with the questions of "intra-enterprise" conspiracy between a parent corporation and its subsidiary. The Court noted, however, the alternate "combination" basis of vertical combination by coercion:

> In any event each petitioner can clearly charge [in the alternative] a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements. [392 U.S. 134, 142.]

Similarly, in *Albrecht v. The Herald Co., supra*, the Supreme Court recognized the viability of a coercive vertical combination theory:

> Petitioner's original complaint broadly asserted an illegal combination under section 1 of the Sherman Act. Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. [390 U.S. 145, 150 n. 6.]

In this context it should be noted that price-fixing is prohibited whether prices are fixed by the sellers or by some third party. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

The ordinance before this Court constitutes such a coerced combination, the undeniable purpose of which is restraint of freedom to set prices (rents). There are no *Noerr* ramifications here. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The landlords did not petition for the privilege to be coerced from exercising their basic economic freedoms. The City has compelled them to join with it in restraint of economic freedom. This combination

places the landlord in the quandary of deciding whether to comply with municipal law or to obey federal law and withdraw from the illegal combination by refusing to obey municipal law. *See Midcal Aluminum v. Rice*, 90 Cal.App.3d 979, 982 (1979). Clearly under such circumstances the ordinance is invalid due to the preemptive weight of the Sherman Act.

III

RENT CONTROL IS INEVITABLY IN CONFLICT WITH THE POLICY AND OBJECTIVES OF THE SHERMAN ACT

Rent control is based upon the premise that "competition itself is unreasonable", *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 696 (1978). Its very purpose and objective is the abolition of the free market in favor of externally imposed controls upon the prices, and, indirectly thereby, other economic decisions by lessors of property.

The policy of the Sherman Act, on the contrary, is to promote independent pricing and decisionmaking by individual traders in the market. Obviously a conflict exists where one government encourages a market participant to retain his independent price policy and another government threatens him with imprisonment if he should refuse to yield that freedom. *See United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

A local enactment is necessarily preempted where, despite the lack of obvious or facial conflict, the local program obstructs the objectives or policies underlying federal law. *Hines v. Davidowitz*, 312 U.S. 52 (1941). For this reason it is unnecessary to find a *conspiracy* to hold preempted a price-fixing program not entitled to *Parker* exemption. *See, e.g., California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980). This "obstruction" approach to preemption is thus explained in Professor Lawrence Tribe's hornbook on constitutional law:

> [S]tate and federal laws need not be contradictory on their face for the latter to supersede the former: There are more subtle forms of actual conflict. Even

> if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie federal enactments. Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage. [Tribe, *American Constitutional Law* (1978) Section 6-24.]

Examples abound outside of the antitrust context. In *Nash v. Florida Industrial Com.*, 389 U.S. 235 (1967), this Court invalidated a state unemployment compensation law which denied benefits to a petitioner who had been dismissed for filing a labor practice complaint. Under Florida law no benefits could be had where unemployment is due to a labor dispute: yet federal law prohibited *employers* from retaliatory or punitive action against employees filing labor grievances. This Court reasoned that the policy of the National Labor Relations Act, 29 U.S.C. Section 151 et seq., was to encourage the filing of valid charges, and that the state practice (although not expressly prohibited thereby) had "a direct tendency to frustrate" that purpose, and accordingly was preempted, 389 U.S. at 239. *See McCulloch v. Maryland*, 4 Wheat 316, 36, 4 L.Ed. 579, 609 (1819); *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896); *Hill v. Florida*, 325 U.S. 538, 542-543 (1945); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

Thus the test of preemption clearly applicable here, *independent* of the ordinance's facial creation of combinations, is that a local act is preempted where the result it obtains "stands as an obstacle to the accomplishments and execution of the full purposes and objectives" of federal law. *Jones v. Rath Packing Co.*, 430 U.S. at 526. Unquestionably if private market participants combined and acted precisely as have respondents upon rents, severe civil and criminal penalties would be brought to bear. *See Arizona v. Maricopa County Medical Soc'y.*, 457 U.S. 332 (1982). This is because the Sherman Act prohibits and deplores the surrender of the right of each trader to independently choose his prices. That policy is offended no less when a local politician manipulates the market. Accordingly, irrespective of whether a punishable "conspiracy" is present, respondents' ordinance conflicts with, and is thus preempted by, the Sherman Act.

CONCLUSION

Amicus curiae California Building Industry Association comes before the Court on behalf of an industry saturated with interstate commerce and directly affected by respondents' price-fixing practice, to respectfully urge the Court to note probable jurisdiction herein and afford this action its own plenary consideration. It is submitted that no other course of action can adequately serve the Court's traditions of orderly administration of justice and careful evolution of *stare decisis*. We are confident that this Court has the ability to resolve the difficult issues thereby presented within the boundaries of existing, cautiously evolved *stare decisis* precepts without succumbing to the temptation to "wander off the map and travel cross-country without the benefit of trail or compass," 37 Cal.3d at 633, Appendix A at A-15; and we pray the Court do so.

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IN THE

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OCTOBER TERM, 1984

ALEXANDRA FISHER, ET AL.,
Appellants,

v.

CITY OF BERKELEY, ET AL.,
Respondents.

On Appeal from the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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TOPICAL INDEX

	Page
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	iv
BRIEF AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Rent Controls On Mobilehome Spaces Have Substantial Impact Upon Interstate Commerce	3
II. Rent Controls Conflict With The Purposes And Objectives Of The Sherman Act	5
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	PAGE
Albrecht v. The Herald Co., 390 U.S. 145 (1968)	5
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)	5
California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	3
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	2, 5, 6
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	2
Fisher v. City of Berkeley, 37 Cal.3d 644 (1984)	passim
Hicks v. Miranda, 422 U.S. 332 (1975)	6
Hines v. Davidowitz, 312 U.S. 52 (1941)	6
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	6
McLain v. Real Estate Bd., 444 U.S. 232 (1980)	3, 4, 5
Nash v. Florida Industrial Com., 389 U.S. 235 (1967)	6
National Macaroni Mfrs. Assn. v. F.T.C., 345 F.2d 421 (7th Cir. 1965)	6
National Society of Professional Engineers v. U.S., 435 U.S. 679 (1978)	5, 6
Parker v. Brown, 317 U.S. 341 (1943)	2
Town of Hallie v. City of Eau Claire, U.S. , 53 L.W. 4418 (1985)	2, 3
Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 (9th Cir. 1982)	5
United States v. Container Corp., 393 U.S. 333 (1969)	5
U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	5
U.S. v. Topco Associates, Inc., 405 U.S. 596 (1972)	5

STATUTES:	
Sherman Act, 15 U.S.C. section 1 et seq	passim

	PAGE
SECONDARY AUTHORITY:	
Areeda & Turner, *Antitrust Law*, Vol. 1 (Little, Brown & Co., 1978)	6
Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 Cornell L.Rev. 604 (1984)	4
Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691 (1983)	4
Tribe, *American Constitutional Law* (Fountain Press, 1978)	6
U.S. House of Representatives, Judiciary Committee, Report No. H.R. 98-965, 98th Cong., 2nd Sess. (1984)	6

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

Amicus curiae Western Mobilehome Association (WMA) respectfully moves this Court pursuant to Rule 36 of the Rules of Court for leave to file the attached brief amicus curiae in support of plaintiffs and appellants, Alexandra Fisher, et al.

Amicus WMA is a nonprofit organization formed in 1945 to promote the interest of mobilehome park owners and

operators in California through the sponsorship of educational programs, the collection and dissemination of information and publications of interest to mobilehome park owners and tenants, and by participation in legislative and judicial processes where the interests of our membership are at stake.

The interests of that membership, of some 1,800 members who provide the public with approximately 190,000 mobilehome rental spaces, are very much at stake in this Court's impending determination of jurisdiction in this case. Should this Court decline jurisdiction and leave intact the opinion of the California Supreme Court herein, it is feared that mobilehome park owners, among other capitalists attempting to serve California consumers, may face a new watershed of municipal price-fixing schemes. Because WMA perceives the denial of *stare decisis* effect to the opinion below as being in itself as important in practice to the protection of a capitalist economy as will be the exposition of this Court's own views on the topic, leave is respectfully sought to file the within brief on jurisdiction. It is respectfully submitted that amicus curiae WMA has a unique perspective in the action which may be of assistance to the Court, inasmuch as unlike lessors of structures, our members provide a temporary location for an interstate commerce product. As the within brief demonstrates, the interstate influx of that product is directly impeded and discouraged by respondents' price-fixing scheme.

Counsel for the Respondents has refused to consent to the filing of the within brief amicus curiae, thus necessitating this motion for leave to file same.

Because the practice directly affects interstate commerce, and because it clearly offends the Sherman Act's objectives and policy, Western Mobilehome Association prays the Court to file and consider the attached brief amicus curiae on behalf of plaintiffs and appellants.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Amicus curiae Western Mobilehome Association (WMA) is a nonprofit association representing the interests of some 1,800 owners and operators of mobilehome spaces provided to owners and residents of mobilehomes in California.

WMA has a unique stake in the outcome of this action in that mobilehome parks have already been singled out for discriminatory treatment by the municipal advocates of rent controls. Of the 493 cities and counties in California, only 52 have succumbed to the temptation to fix rents. Of those 52, 38 fix rents on mobilehome space only, leaving only 14 that regulate all rental units. As the principal objects of roughly three-fourths of the illegal rent-fixing schemes imposed in California, WMA's members have a substantial stake in the outcome of this appeal—and are likely to bear the brunt of any watershed of new rent-fixing schemes occasioned by the "carte blanche" afforded municipalities by the opinion below.

Further, the statistical experience of the mobilehome industry under rent controls is uniquely instructive as to both interstate commerce involvement and the marketplace impacts of municipal price-fixing in the instant context.

Counsel for WMA are familiar with the issues presented by this action and believe that the information and perspective provided herein may be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court, in a series of municipal antitrust decisions culminating in the recent case of *Town of Hallie v. City of Eau Claire*, 53 L.W. 4418 (1985), has now settled the issue of municipal coverage under the Sherman Act (15 U.S.C. section 1, et seq.). *Stare decisis* of this Court clearly dictates that cities must respect the prohibitions of the antitrust laws except to the extent they enjoy the "state action" exemption therefrom first articulated in *Parker v. Brown*, 317 U.S. 341 (1943). The availability of that exemption depends upon a showing by the municipality that it is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace that area of competition with regulation, with the legislature having "contemplated" that the particular kind of restraint being examined would be employed in the implementation of that state policy. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 412 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982); *Town of Hallie, supra*, 53 L.W. 4418, 4419 (1985).

There is no question in this case that California has no state policy displacing competition in rents with regulation of rental prices. Indeed, the opinion below notes, "California has no rent control statute," 37 Cal.3d at 655, reaffirming its opinion that the power to fix prices arises from the "home rule" provisions of California's Constitution. *Id.* It is submitted that there is no real issue herein as to the unavailability of *Parker* exemption.

Rather, the issue is whether the respondents' price-fixing scheme (1) impacts upon a market with "not insubstantial" ties to interstate commerce "as a matter of practical economics," *McLain v. Real Estate Bd.*, 444 U.S. 232,246 (1980), and (2) is preempted by the Sherman Act because it obstructs the policies promoted thereby, *California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980). We respectfully suggest herein that the answer to each is in the affirmative, and further that the opinion below, unless superseded by plenary consideration and formal opinion by this Court, will have far-reaching and disastrous effects far beyond the economic boundaries of the housing market, applicable as it is to price fixing and other market manipulation of all goods and services.

ARGUMENT

I

RENT CONTROLS ON MOBILEHOME SPACES HAVE SUBSTANTIAL IMPACT UPON INTERSTATE COMMERCE

Despite the fact that "California has no rent control statute," 37 Cal.3d at 655, Appendix A at A-6, 52 California municipalities control rents on some or all residential units within their reach. Respondent City of Berkeley is one of the 14 cities that illegally fix rents on all units, including mobilehome spaces. Appendix G at A-112. The other 38 have focused exclusively upon mobilehome spaces.

A mobilehome park is a unique form of housing in that it is, in essence, a destination for an interstate commodity. For example, in January of 1984 the states of Florida, Texas, and North Carolina were the top three producers of mobilehomes in the Nation, while California ranked only twentieth in mobilehome production. Yet California ranks much higher as a point of destination for mobilehomes, having the third largest mobilehome population in the Nation. As a result, a very large proportion of mobilehomes presently situated in California traveled interstate to their present location.

Nor is the interstate role of these goods necessarily completed. Mobilehomes are just that, mobile homes. They are capable of being moved as needed to an interstate destination along with their owner, unlike permanent housing structures.

The interstate sale and transfer of these goods, however, is dependent upon the availability of mobilehome space. That availability is impaired by the heavy hand of local regulation restricting profits to a level deemed "fair" by a politically inspired bureaucrat. Compared with other, unregulated investments, volunteering to subject one's capital to such risks does not appear to most to be the wisest of investments. As a result, no significant construction of mobilehome park spaces in California has occurred since 1979, despite ever-increasing demand therefor. Such, it is submitted, is almost invariably the market response to rent controls, perpetuating the housing shortage the controls purport to ameliorate. *See* Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 Cornell L. Rev. 604, 609-610 (1984); Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691, 698 (1983).

For the antitrust laws to be applied to this price-fixing scheme, it must first appear that the practice impacts upon an economic activity which as a matter of practical economics has a not insubstantial effect on interstate commerce. *McLain v. Real Estate Bd.*, 444 U.S. 232 (1980). It is not necessary to show the "more particularized showing" that the illegal conduct itself directly impacts interstate commerce, but only that the

"local" activity directly affected has "not insubstantial" ties to commerce. *Id.* at 242-243; *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 (9th Cir. 1982).

Here we have a locally created price-fixing scheme having a marked effect upon the "local" activity which is *absolutely essential* to an interstate industry. If mobilehome parks are not built, mobilehomes will not be sold in interstate commerce. It is submitted that the *de facto* "cap" placed on California mobilehome space by the "chill" of rent controls and the threat thereof is having a *very* significant effect in the interstate market place for mobilehome sales, and accordingly that the "nexus" here to interstate commerce is far stronger than the issue of a few percentage points of brokers' commissions found facially adequate in *McLain, supra.*

II

RENT CONTROLS CONFLICT WITH THE PURPOSES AND OBJECTIVES OF THE SHERMAN ACT

The purpose of the Sherman Act is to promote economic freedom, with resulting benefits to the economy as a whole, and *particularly* to hold inviolate the independent trader's discretion to set his own price as his judgment and market conditions dictate. *See United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. at 406-407; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 226 n.6 (1940).

Obviously rent controls obstruct the Sherman Act's basic policy dictate that an arrangement that interferes with the setting of price by free market forces is illegal on its face. *United States v. Container Corp.*, 393 U.S. 333, 337 (1969); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978). Price *ceilings* have long be condemned along with price *floors* due to their pernicious economic effects beyond the superficial "benefit" of price containment. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Albrecht v. The Herald Co.*, 390 U.S. 145, 152-153 (1968);

National Macaroni Mfrs. Assn. v. F.T.C., 345 F.2d 421 (7th Cir. 1965). This Court has heard before the complaint that some forms of price fixing are "good" and should be overlooked, and has correctly responded that, "that kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason." *Professional Engineers, supra,* 435 U.S. at 689-690. Those arguments have been made to Congress and a blanket exemption sought on behalf of cities, and Congress has refused to go so far. *See* House Judiciary Committee Report to the Committee of the Whole House on H.R. 6027 (Local Government Antitrust Act of 1984), H.R. Rep, 98-965, 98th Cong., 2nd Sess. (1984). It follows, we submit, that the lower court erred by refusing to apply *economic* rather than *political* principles to the question whether the respondents' price-fixing scheme conflicts with the Sherman Act. *See Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *Nash v. Florida Industrial Com.*, 389 U.S. 235, 239 (1967); *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-541 (1977); Areeda & Turner, *Antitrust Law,* Vol. 1 (Little, Brown & Co., 1978) at 62; Tribe, *American Constitutional Law* (Foundation Press, 1978), section 6-24. The lower court deftly skirted the overwhelming *stare decisis* militating for a finding of preemption by reading into the Sherman Act a "public welfare defense" Congress had just rejected, and radically restructuring the principles of preemption under the Supremacy Clause. 37 Cal.3d at 673, 675, Appendix A at A-28, A-30.

If this Court does not curtail those radical shifts in the law by plenary consideration herein they will become *stare decisis* not only for the courts of California but for the federal courts as well. *Hicks v. Miranda,* 422 U.S. 332, 344-345 (1975). As a result there will be no real forum for the protection of a capitalist economy from overreaching regulations, and the "serious economic dislocation which could result if cities were free to place their own parochial goals above the Nation's economic goals," *Lafayette,* 435 U.S. at 412-413, will certainly come to pass. We beseech the Court to afford plenary consideration herein.

CONCLUSION

This case presents for the first time to this Court the issue of substantive conflict between municipal price fixing and the Sherman Act. Amicus curiae Western Mobilehome Association appears herein to advise the Court of the substantial interstate interests presently at the mercy of respondents and other like-minded municipal regulators who claim pursuant to general "home-rule" provisions of the California Constitution the power to fix private parties' prices in the marketplace. We submit that unless this Court affords its own plenary consideration herein the body of law heretofore developed in this Court and lower federal courts will be subsumed by this new, insurmountable "public welfare defense" which clearly thwarts the will of Congress and abolishes the muncipal antitrust restraints cautiously developed by this Court. We respectfully urge that the Court note probable jurisdiction and docket this case for briefing and argument on the merits.

Respectfully submitted,

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27 pp

TOPICAL INDEX

	Page
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	iv
BRIEF AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. PRICE-FIXING REGULATION OF RESIDENTIAL RENTS BY LOCAL GOVERNMENT VIOLATES THE SHERMAN ACT AND IS PREEMPTED UNDER THE SUPREMACY CLAUSE IN THE ABSENCE OF EXPRESS STATE OR FEDERAL AU4	
A. Federal Restraints on Local Police Power.	4
B. Preemption by the Sherman Act Under the Supremacy Clause	5
C. The Effect of the Rent Control Ordinance on Interstate Commerce is Not Insubstantial	6
D. The Rent Control Ordinance is Not Saved From Sherman Preemption Under the Doctrine of *Parker v. Brown*	10
II. THE MODIFIED COMMERCE CLAUSE TEST CREATED BY THE CALIFORNIA SUPREME COURT ERRONEOUSLY LIMITS THE APPLICABILITY OF SHERMAN TO MUNICIPAL REGULATION AND ADDS CONFUSION TO THIS AREA OF THE LAW	15
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
CASES:	
Albrecht v. The Herald Co., 390 U.S. 145 (1968)	5, 6
Birkenfeld v. City of Berkeley, 17 Cal.3d 129 (1976)	3, 14
California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	4, 5, 6
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	*passim*
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	*passim*
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	5
Fisher v. City of Berkeley, 37 Cal.3d 644 (1984)	*passim*
Hicks v. Miranda, 422 U.S. 332 (1975)	4, 20
Hines v. Davidowitz, 312 U.S. 52 (1941)	5, 6
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951)	5, 6
Lorrie's Travel & Tours, Inc., v. SFO Airporter, Inc., 753 F.2d 790 (9th Cir. 1985)	11
McLain v. Real Estate Bd., 444 U.S. 232 (1980)	*passim*
Parker v. Brown, 317 U.S. 341 (1943)	10, 11, 12, 20
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)	5
Simpson v. Union Oil Co., 373 U.S. 13 (1964)	5
Town of Hallie v. City of Eau Claire, ___ U.S. ___, 53 L.W. 4418 (1985)	13, 14, 15, 20
United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956)	5
U.S. v. Topco Associates, Inc., 405 U.S. 596 (1972)	4, 6
United States v. Trenton Potteries Co., 273 U.S. 392 (1927)	6
CONSTITUTION:	
United States Constitution, Commerce Clause (Art. I, Sec. 8, cl. 3)	*passim*
United States Constitution, Supremacy Clause (Art. VI, para. 2)	2, 5, 20

	Page
STATUTES:	
15 U.S.C. section 1 et seq.	*passim*
28 U.S.C. section 1257	4
Berkeley Ordinance 5612-N.S. ("Measure D")	*passim*
SECONDARY AUTHORITY:	
Areeda, *Antitrust Law* (Little, Brown & Co., Supp. 1982)	7
Baird, *Rent Control: The Perennial Folly*	7
Bay Area Council, *Rental Housing in California: Obstacles & Opportunities*, April 1983	9
Fraser Institute, *Rent Control, A Popular Paradox* (1975)	8
Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 Cornell L.Rev. 604 (1984)	8
Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691 (1983)	7, 8
Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 721 (1983)	8
Tribe, *American Constitutional Law*, Section 6-2 (Foundation Press, 1978)	18
Urban Land Institute, *Prospects of Rental Housing Production Under Rent Control: A Case Study of Washington, D.C.* (1976)	8

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Pursuant to Rule 36 of the Rules of the Court, amicus curiae Chamber of Commerce seeks leave to file the attached brief amicus curiae in support of the plaintiffs and appellants, Alexandra Fisher, et al.

The California Chamber of Commerce is a voluntary, non-profit business association with more than 4,800 members from virtually every industry and geographic section in the state of California. The Chamber's membership also includes 150 trade associations and it is closely affiliated with 387 local and regional chambers of commerce and more than 167,000 small businesses. The Chamber estimates that its members and affiliated local chambers employ 75 percent of the private work force in California. The issues presented in this case drastically impact upon commercial industries throughout the state and

local region and are of vital importance to the Chamber and its members and affiliated chambers. The test drafted by the court below not only permits municipalities to control rent but also gives them license to regulate nearly every aspect of the economy in the name of health, safety, and welfare, regardless of the impact on more overriding state and national goals. If this ill-conceived test, which departs significantly from the precedent established by this Court, is allowed to stand, businessmen throughout the state of California will fall by the sword of local governments whose only concern is to serve their own parochial interests, oblivious to the concerns of national economic policy. For these reasons, amicus California Chamber of Commerce is deeply concerned over the outcome of this case, and is submitting this brief to assist this Court in its consideration of the matter.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36, the California Chamber of Commerce submits this brief amicus curiae in support of plaintiffs and appellants, Alexandra Fisher, et al. A motion has been attached pursuant to 36.1 requesting leave to file this brief in the absence of consent of the parties.

Amicus curiae California Chamber of Commerce ("The Chamber") is a voluntary, non-profit, California-wide business association, with more than 4,800 members from virtually every industry and geographic section in the state. Ninety percent of the members are small or medium-size businesses. The Chamber's membership also includes 150 trade associations, and it is affiliated with and regularly communicates on current business

issues with 387 local and regional chambers of commerce and more than 167,000 small business. The Chamber estimates that its members and affiliated local chambers employ 75 percent of the private sector work force in California.

The Chamber, on behalf of its members and affiliates, is vitally interested in the issues involved in this case. Rent control ordinances, such as the one enacted by the city of Berkeley, substantially impact upon commerce throughout the state of California and the western region of the United States. The economic harm inflicted by these anticompetitive activities can be felt not only in the residential housing industry but also in almost ever commercial industry throughout the state. Businessmen throughout California feel that this type of municipal regulation, enacted to further the purely parochial interests of the municipality and not pursuant to a clearly articulated and expressed state policy to displace competition with regulation, severely disrupts the state and national free-market goals. The Chamber, therefore, respectfully urges the Court to note probable jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

The clear intent of Congress and the rule repeated by this Court in several recent decisions is that local governments are subject to scrutiny under the antitrust laws unless the municipal action constitutes the "implementation of clearly articulated and affirmatively expressed state policy" to "displace competition with regulation or monopoly public service." Consequently, anticompetitive ordinances enacted to further the parochial interests of the municipality, which conflict with federal antitrust laws, will be preempted by the Sherman Act under the Supremacy Clause of the United States Constitution. The rent control ordinance imposed upon private landlords by the city of Berkeley constitutes price-fixing in its purest form. Maximum as well as minimum price-fixing has long been held as a *per se* violation of the Sherman Act. That price-fixing is an "unreasonable or unlawful" restraint of trade and, as such, is *per se* invalid under the Sherman Act "without the necessity of minute inquiry" is well settled. Any municipal ordinance that contemplates such anticompetitive conduct "stands as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and should be preempted by federal law.

The California Supreme Court in *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129 (1976), acknowledged "the conceded absence of any state statute authorizing local legislation on the subject." In fact, the Court expressly stated that "California has no rent control statute." *Id.* at 141. Therefore, the rent control ordinance enacted by the city of Berkeley is not beyond the intended scope of the federal antitrust laws and is preempted under the Supremacy Clause.

Moreover, the nexus between the rent control ordinance and interstate commerce, as a matter of practical economics, is sufficient to invoke federal jurisdiction under the Sherman Act. Most economists and commentators agree that maximum rent ceilings cause serious economic dislocation, including the retardation in the volume of rental housing sales and production. This retardation, in turn, affects the demand for financing and title insurance as well as the commercial industries involved with housing construction. In *McLain v. Real Estate Bd.,* 444 U.S. 232 (1980), this Court found a similar interstate effect sufficient to satisfy jurisdictional requirements under Sherman.

Finally, amicus curiae California Chamber of Commerce urges this Court to give plenary consideration to this case because of the threat posed by the ill-grounded and overly broad test created by the court below to determine the applicability of the Sherman Act to anticompetitive municipal regulation. Chamber members are confused by the California Supreme Court decision, which departs significantly from precedent firmly established by this Court in earlier case law. Consequently, businessmen throughout California fear that the court below has given municipalities "carte blanche" to enact any type of anticompetitive regulation that conceivably can be justified in the name of health, safety, and welfare, regardless of more overriding state and federal goals. On the other hand, they also are reluctant to participate with municipalities as beneficiaries of their anticompetitive regulation because of the uncertainty created by the decision below. Because this case

comes before the Court on appeal under 28 U.S.C. 1257(2), any summary disposition by this Court will be treated as one on the merits and accordingly will be afforded *stare decisis* effect by lower state and federal courts. *See Hicks v. Miranda,* 422 U.S. 332 (1975). In light of the devastating effect that this would have on established federal antitrust law, we respectfully urge this Court to consider this important case on the merits.

ARGUMENT

I

PRICE-FIXING REGULATION OF RESIDENTIAL RENTS BY LOCAL GOVERNMENT VIOLATES THE SHERMAN ACT AND IS PREEMPTED UNDER THE SUPREMACY CLAUSE IN THE ABSENCE OF EXPRESS STATE OR FEDERAL AUTHORIZATION

A. Federal Restraints on Local Police Power

The plenary power of Congress to regulate commerce under the Commerce Clause of the United States Constitution (Art. I, Sec. 8, cl. 3) imposes a preemptive limitation upon the exercise of police power by state and local governments. Congress' most expansive exercise of the Commerce Clause to date is the Sherman Antitrust Act (15 U.S.C. sec. 1 et seq.) In *California Retail Liquor Dealers Assn. v. Midcal Aluminum,* 445 U.S. 97 (1980), this Court emphasized the weight of the federal procompetitive policy:

> The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.
>
> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). [445 U.S. at 110-111.]

By enacting the Sherman Act, Congress "sought to establish a regime of competition as the fundamental principal governing commerce in this country." *Lafayette v. Louisiana Power & Light Company,* 435 U.S. 389, 398 (1978). The importance of this "natural regime of competition" requires that local governmental bodies be subjected to and controlled by the guiding force of the Sherman Act.

B. Preemption by the Sherman Act Under the Supremacy Clause.

Local law is preempted by federal law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97, a case involving a statute that required members of the California wine industry to file fair trade contracts or price schedules with the state, this Court held that the statute facially conflicted with the Sherman Act because it mandated resale price maintenance, an activity that has traditionally constituted a *per se* violation of the Sherman Act. *Id.* at 102-103.

The conduct contemplated by the Berkeley rent control ordinance constitutes price-fixing. Price-fixing schemes, through which intercessionary forces displace supply and demand and the judgment of independent traders in the determination of prices, are traditional and vulnerable targets of antitrust scrutiny. Price-fixing is prohibited as a *per se* violation of Sherman, *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911), and it is immaterial whether the effort is to fix minimum or maximum prices; *Albrecht v. The Herald Company,* 390 U.S. 145, 152-153 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 213 (1951). Moreover, price-fixing is prohibited whether prices are fixed by the sellers or by some third party. *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964); *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384 (1951). As this Court summarized in *U.S. v. McKesson & Robbins, Inc.,* 351 U.S. 305 (1956), in a price-fixing case it makes no difference whether the motives are good or evil, what means are employed, whether the amount of

commerce affected is small or large, or whether the effect of the price manipulation is to increase or to decrease prices. Fiddling with market prices is simply prohibited, and it is a *per se* violation of the Sherman Act.

The city of Berkeley's Measure D is preempted by the Sherman Act because it clearly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). This Court has repeatedly stated that these policies are the preservation of free enterprise and open competition. *See, e.g., United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972); *California Retail Liquor Dealers Assn. v. Midcal Aluminum,* 445 U.S. 97, 110-111 (1980). By prohibiting upward price competition, rent control has the direct effect of "elimination of one form of competition." *United States v. Trenton Potteries Co.,* 273 U.S. 392, 397 (1927). The fact that Berkeley's rent control ordinance fixes a ceiling rather than a floor on rental housing is irrelevant; this Court has held that maximum price-fixing is as deleterious to competition as minimum price-fixing. *Albrecht v. The Herald Company,* 390 U.S. 145, 152-153 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 213 (1951). This type of price-fixing arrangement, in the abstract, creates the "potential power" to eliminate competition in the rental housing market. It is, in itself, an "unreasonable or unlawful" restraint, and, as such, is *per se* invalid, "without the necessity of minute inquiry." *See Trenton Potteries, supra,* 273 U.S. at 397. Therefore, because the rent control ordinance enacted by the city of Berkeley contemplates price-fixing, which is a *per se* violation of the federal antitrust laws, the ordinance is condemned under section 1 of the Sherman Act.

C. The Effect of the Rent Control Ordinance on Interstate Commerce is Not Insubstantial.

The broad authority of Congress to regulate under the Commerce Clause has been interpreted to extend beyond activities that are "in commerce" to include wholly interstate activities that have a substantial "effect on commerce." *McLain v. Real Estate Bd.,* 444 U.S. 232, 241 (1980).

Federal jurisdiction under the Sherman Act may be established by a showing that the allegedly anticompetitive conduct contemplated by the rent control ordinance has, "as a matter of practical economics," a not insubstantial effect on the interstate commerce involved. *McLain,* 444 U.S. at 246.

Phillip Areeda, interpreting the *McLain* decision, stated:

> [T]he court [elsewhere] made clear that there must be a nexus, at least "as a matter of practical economics" between the challenged conduct and interstate commerce. Thus, *McLain* seems to mean that although the plaintiff need not make a "particularized showing" of an actual interstate effect caused by the challenged conduct, he must show that it would inherently tend, as a matter of practical economics, to have an interstate effect. [P. Areeda, *Antitrust Law,* paragraph 232-1c (Supp. 1982).]

In *McLain,* a case in which the real estate brokers in the New Orleans area allegedly agreed to fix brokerage commissions through fixed rates, engaged in fee-splitting and suppression of market information useful to buyers and sellers, this Court found federal jurisdiction based upon the effect of the alleged brokerage activities on interstate commerce. (*Id.* at 242.)

Following an approach of "practical economics," as suggested by *McLain,* a not insubstantial effect upon interstate commerce clearly can be established in this case based upon the nexus between the rent control ordinance enacted by the city of Berkeley and interstate commerce. In fact, a striking similarity exists between the interstate effect of brokerage services in *McLain* and the effect on interstate commerce when a municipality imposes an artificial ceiling on rents charged by private landlords. Justice Lucas correctly noted in his dissent below that "[e]conomists are virtually unanimous in their condemnation of rent control laws." Opinion below, 37 Cal.3d 644, 715-716 (1984) (citing, *e.g.,* Baird, *Rent Control: the Perennial Folly* pp. 54-78; *Rent Control, A Popular Paradox* (The Fraser Institute edition 1975) [essays by nine economists]; Muth,

Redistribution of Income Through Regulation in Housing, 32 Emory L.J. 691, 698 (1983)). He points out that most economists take the view that rent control schemes cause what the Court has called "serious economic dislocation." Opinion below, 37 Cal.3d at 716 (citing *Lafayette,* 435 U.S. at 412-413). He quotes, as example, the following observation made by Professors Milton Friedman and George Stigler:

> Rent ceilings, therefore, cause haphazard and arbitrary allocation of space, inefficient use of space, *retardation of new construction* and indefinite continu nce of rent ceilings, or subsidisation of new construction and a future depression in residential building. [Opinion below, 37 Cal.3d at 716 (Lucas, J., dissenting) (citing Friedman and Stigler, *Roofs or Ceilings? The Current Housing Problem,* in *Rent Control, A Popular Paradox,* p. 100 (The Fraser Institute edition (1975)).]

Most economists and commentators agree that maximum rent ceilings have a negative impact on the production of new rental housing. *See,* e.g., Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws,* 69 Cornell L.Rev. 604, 609-610 (1984) (concluding that in the long run, rent control will have a chilling effect on investors, curtailing the supply of housing); Siegan, *Commentary on Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 721, 723 (1983) (asserting that the most harmful economic effect of rent control is manifested by its impact on housing production); Urban Land Institute, ULI Research Report #24, *Prospects of Rental Housing Production Under Rent Control: A Case Study of Washington, D.C.,* at 15 (1976) (concluding that "because housing investors are as much concerned about the propensity for future intervention affecting the economics of property operation as with current regulations," no significant amount of new rental housing will be produced until the rent controls are lifted). Artificially-created barriers to the production of new rental housing has an even more substantial effect upon interstate commerce than the fixing of brokerage fees. In discussing the effect of brokerage

activities on the frequency and terms of residential sales transactions, the *McLain* Court stated that "whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance." *McLain,* 444 U.S. at 246. These two commercial activities were shown in *McLain* to have occurred in interstate commerce. *Id.*

A retardation in the production of new rental housing, caused by the rent control ordinance, directly affects the demand for financing and title insurance. Just as in McLain, funds for financing the production of new rental housing in Berkeley are raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multistate lending institutions take mortgages insured under federal programs which necessitate the interstate transfer of premiums and settlements. Moreover, mortgage obligations are physically and constructively traded as financial instruments in the interstate secondary mortgage market. In addition, lending institutions in California usually require title insurance before making a mortgage loan. This title insurance is often furnished by interstate corporations.

According to an analysis by the Construction Industry Research Board,[1] 38,513 fewer rental housing units were built in California in 1983 as compared to 1978. This represented a loss of $1.7 billion in construction and 47,300 fewer jobs in construction employment. Moreover, this decrease in rental housing production resulted in 69,500 fewer non-construction jobs in California and 34,200 fewer jobs outside of the state.

A publication by the Bay Area Council of San Francisco entitled, *Rental Housing in California: Obstacles and Opportunities* (April 6, 1983) revealed the following:

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[1] Figures compiled and integrated in Spring 1984 by Construction Industry Research Board, a nonprofit industry research institute, through the application of U.S. Department of Commerce Bureau of Economic Analysis "input-output" models, developed to identify interstate commerce relationships, to building permit statistics provided by the Department of Commerce Bureau of Census. These figures were submitted to the state Supreme Court by letter brief of amicus California Building Industry Association on May 1, 1984.

> The summary of results stated, "rent control is a major barrier to investment in rental housing development projects in California—even in communities without rent control ordinances."
>
> Of the mortgage lenders surveyed, 82% agreed that "rent control is a threat to any new multifamily project in California, no matter where it is located . . ." [*See* Appendix H, A-147-148.]

The report continued by stating that rent control was by far the most frequently named disincentive for multifamily lending in California. Clearly, rent control "affects the demand for financing and title insurance" both in and out of the State of California. *See McLain,* 444 U.S. 246.

Moreover, a reduction in new rental housing production will substantially impact on the interstate flow of goods and services that relate directly to the construction industry. The Construction Industry Research Board report clearly illustrates that a reduction in rental housing production, caused by a rent control ordinance, can directly result in the loss of thousands of non-construction jobs outside of the state. The economic impact of these losses will in turn be felt in each of these respective states. In essence, Berkeley's rent control ordinance will have a trickling effect upon commerce throughout the state of California and the western region of the Country. In sum, "as a matter of practical economics," the rent control ordinance enacted by the city of Berkeley has an effect upon interstate commerce that is not insubstantial; therefore, federal jurisdiction under the Sherman Act may be firmly established.

D. The Rent Control Ordinance is Not Saved from Sherman Preemption Under the Doctrine of *Parker v. Brown.*

The Sherman Act neither expressly includes nor expressly excludes governmental activity from its anticompetitive prohibitions. Confronted with contentions that the Sherman Act forbade market interference by a state, this Court in *Parker v. Brown* 317 U.S. 343 (1943), cleared up this ambiguity by holding:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. [*Id.* at 350-351.]

While the *Parker* doctrine is commonly referred to as establishing state action "immunity," its holding is that state anticompetitive activity which conflicts with Sherman was not intended to fit within the congressionally intended scope of federal antitrust laws. *See Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.,* 753 F.2d 790, 792 n. 1 (9th Cir. 1985).

Only in the past five years has the Court clarified the limitations upon this immunity, limitations which actually appear in seminal *Parker v. Brown* language. That language declares an immunity for activities of a *state* or its officers or agents when "directed by its *legislature,*" because in a "dual system of government" the *states* are sovereign" and the Court is reluctant to infer an intent to "nullify a *state's* control over its officers and agents." It is now well settled that the "state action immunity" only attaches to activity specifically directed by state law involving some degree of state control or supervision and that the Federalist deference to state sovereignty runs only to states *qua* states and not to their political subdivisions acting on their own without specific authorization.

The first clear indications of this limitation upon state action immunity came in 1978 in *City of Lafayette v. Louisiana Power and Light Co.,* 435 U.S. 389 (1978). In that case, this Court *rejected* the contention that, quite apart from *Parker,* "Congress never intended to subject local governments to the antitrust laws." 435 U.S. at 394. On the contrary, the plurality opinion states that:

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker*'s limitation of the exemption to "official action directed by a state," is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. *In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach."* [435 U.S. at 412-413 (footnote omitted; citations omitted).]

A similar scenario arose in the case of *Community Communications Co., Inc. v. City of Boulder,* 455 U.S. 40 (1982). In that case, a private cable TV operator asserted antitrust objections to the City of Boulder's denial of its request to extend its area of service. Notwithstanding *City of Lafayette,* the city of Boulder asserted *Parker v. Brown* immunity based upon its status as a "home rule" municipality under the Colorado Constitution.

The Court reviewed the *City of Lafayette* opinion and other authority, and held:

> Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see *Parker,* or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette, Orrin W. Fox Co.,* and *Midcal.* [455 U.S. at 52.]

As to the contention that a "home rule" state constitutional provision would constitute adequate delegation of state authority, the *Boulder* opinion responds:

> [P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A state that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted,*" since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. . . Thus in respondent's view, Boulder can pursue its course of regulating cable television competition, while another home rule city choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require. [455 U.S. at 55-56.]

In *Town of Hallie v. City of Eau Claire,* 50 L.W. 4418 (1985), a recent case involving an alleged monopoly by a municipality over the provision of sewage treatment services and a tying arrangement between these services and the collection and transportation of waste, this Court, in review of the earlier case law, unequivocally stated:

> Municipalities . . . are not beyond the reach of antitrust laws by virtue of their status because they are not themselves sovereign . . . . Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the state "pursuant to state policy to displace competition with regulation or monopoly public service." [*Id.* at 4419 (Citations omitted.)]

The California Supreme Court in *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129 (1976), has acknowledged "the conceded absence of any state statute authorizing local legislation on the subject." *Birkenfeld,* 17 Cal.3d at 140. The court expressly stated that "California has no state rent control statute." *Id.* at 141. In the area of price regulation, no statutory prohibition of local action is needed to invalidate it where the standard for validity is "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Boulder,* 455 U.S. at 52. Moreover, that requirement "is *not* satisfied when the State's position is one of mere *neutrality* respecting the municipal action challenged as anticompetitive." *Boulder,* 455 U.S. at 55 (emphasis added).

In this case, no empowering statute exists from which anticompetitive conduct can foreseeably result. The California Supreme Court acknowledged "the conceded absence of any state statute authorizing local legislation on the subject. *Birkenfeld,* 17 Cal.3d. at 140. Not only is there no contemplation of anticompetitive conduct, but there is no state statute authorizing municipalities to regulate rents in the first instance, from which such legislative contemplation could flow. The inescapable conclusion is that such local price-fixing regulation is illegal and this Court should so hold. Therefore, any municipal ordinance authorizing such anticompetitive regulation, in the absence of "clearly articulated and affirmatively expressed state policy," should be preempted by the Sherman Act.

Moreover, in *Town of Hallie,* this Court also concluded that the requirement of active state supervision "should not be imposed in cases in which the actor is a municipality." *Town of Hallie,* 53 L.W. at 4421 (1985). This Court clarified in a footnote, however, that in situations in which "municipal regulation of a private party is involved, active state supervision must be shown, even where a clearly articulated state policy exists." Id. at 4421 n.10. Therefore, in this case, in which the City of Berkeley is regulating the rents chargeable by private landlords, even if a clearly articulated state policy did exist, the City of Berkeley could not claim state action immunity because no active state supervision of rent control can be shown.

II

THE MODIFIED COMMERCE CLAUSE TEST CREATED BY THE CALIFORNIA SUPREME COURT ERRONEOUSLY LIMITS THE APPLICABILITY OF SHERMAN TO MUNICIPAL REGULATION AND ADDS CONFUSION TO THIS AREA OF THE LAW

In *Lafayette* and *Boulder,* this Court clearly stated that anticompetitive municipal action is shielded from antitrust preemption only in situations in which the action is taken "pursuant to state policy to displace competition with regulation or monopoly public service," *Lafayette,* 435 U.S. at 413, which is both "clearly articulated and affirmatively expressed." *Boulder,* 455 U.S. at 54. In *Lafayette,* this Court unequivocally rejected the argument that deference to local government policy compelled the finding of an implied exclusion from antitrust prohibitions for "actions of municipalities that exist to serve the public weal, . . ." *Lafayette,* 435 U.S. at 403. Justice Brennan, delivering the opinion of the Court, stated:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. [*Lafayette,* 435 U.S. at 408 (footnote omitted).]

In *Town of Hallie,* this Court reiterated that "[m]unicipalities are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie,* (1985) 53 L.W. at 4419.

We are confused, however, by the California Supreme Court's significant departure from this Court's clearly defined test in *Boulder, Lafayette* and *Town of Hallie.* The Court below maintained exactly the opposite position:

> To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate for the motives that underlie local government regulation (citations

> omitted), courts must develop tests that recognize a public welfare "defense" to alleged violation of the antitrust laws by municipalities. [Opinion below, 37 Cal.3d at 673.]

In attempting to create this "public welfare defense," the California Supreme Court rejected the traditional *per se* prohibition of price-fixing, because "[i]n our view, maximum rent price-fixing, implemented by local government, is simply not of the same character as price fixing among private business defendants." Opinion below, 37 Cal.3d at 670. In circumventing existing precedent established by this Court in order to force antitrust policy to give way to the local police power autonomy, the California court candidly admitted that it was motivated by a desire to restore anticompetitive autonomy to cities, stating that "if unbending application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate municipal regulation, we will not hesitate to cautiously depart from traditional rules." Opinion below, 37 Cal.3d at 664.

In designing this "public welfare defense" by which a municipality can engage in, mandate and authorize conduct, without state authorization, that is anticompetitive in both purpose and effect, the court below created a standard under which the anticompetitive ordinance is deemed not to conflict with the Sherman Act. To withstand a Sherman attack, the ordinance need only comport with what is in essence an amalgam of substantive due process and Commerce Clause negative implications tests.

The admitted purpose of this test which fairly conclusively presumes the supremacy of local policy over national antitrust policy, is to prevent "judicial second-guessing of local decisions to accomplish proper local purposes." Opinion below, 37 Cal.3d at 673. The California court articulated its test in the following manner:

> Adapting the court's commerce clause test to this facial section 1 attack on a municipal rent control ordinance, we conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power,

> and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. [Opinion below, 37 Cal.3d at 675 (footnotes omitted).]

In footnote 27 accompanying the test quoted above, the California court explains that this exemption applies not only to "traditional" or "integral" functions, but rather would immunize "all local action rationally related to the promotion of local health, safety and welfare." *Id.* at n.27. Although the court borrowed elements of "evenhandedness" and "less intrusive means" from this Court's previous Commerce Clause cases, such borrowing was purposefully selective since the court expressly excludes this Court's well-established cost-benefit balancing test:

> We will, however, depart from the United States Supreme Court's commerce clause test is [sic] one significant respect. We will not apply the wide-ranging, essentially standardless cost-benefit analysis employed in the court's recent "balancing" decisions. *See, e.g., MITE Corp., supra,* 457 U.S. 624; *Kassel, supra,* 450 U.S. 662; *Clover Leaf Creamery, supra,* 449 U.S. 456; *see generally,* Eule, *Laying the Dormant Commerce Clause to Rest* (1982) 91 Yale L.J. 425 [criticizing the court's balancing approach, and proposing an alternate standard]: Maltz, *How Much Regulation is too Much—An Examination of Commerce Clause Jurisprudence* (1981) 50 Geo.Wash.L.Rev 47 [same]; Tushnet, *Rethinking the Dormant Commerce Clause* 1979 Wis.L.Rev. 125 [same]. [Opinion Below, 37 Cal.3d at 675.]

Significantly, the California court is borrowing tests from the wrong body of law. The line of authority cited above to circumvent the reach of federal antitrust law deals with the "dormant Commerce Clause," also known as the "negative implications" of the Clause, which remain as a limit to state

action upon interstate commerce even in the absence of preemptive congressional action. *See* Tribe, *American Constitutional Law,* Section 6-2 (Foundation Press, 1978). This case does not involve a situation in which no express congressional action has been taken and the issue becomes whether the "negative implications" of the Commerce Clause allocation of commerce jurisdiction to Congress implicitly forbid state interference, but rather involves the adjudication of a claim of direct preemption of local action by express congressional action pursuant to the Commerce Clause. The question in this case is simply whether a conflict exists between the two schemes, in which case the congressional policy *must* prevail. Professor Tribe aptly described the difference in congressional action:

> So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action—and the validation of congressionally authorized state or local action—flow directly from the substantive source of the congressional action coupled with the supremacy clause of article VI; such cases may pose complex questions of statutory construction but raise no controversial issues of power. Those issues are raised, however, when state power is said to be ousted not because of specific conflict with what Congress has *done* but because of negative implications thought to flow from what Congress *might* have done. Such ouster of state authority because of "dormant" congressional power of course lies at the heart of most commerce clause litigation. [Tribe, *supra,* section 6-23; footnote omitted, emphasis in original.]

Clearly, the California court has misapplied the law established by this Court.

In reality, although the test below is couched in terms of substantive "conflict" between federal and municipal law, the California court, by creating this test, has attempted to overrule this Court's opinions in *Lafayette* and *Boulder* and to uphold the argument, expressly rejected in both those cases, that municipal action in pursuit of local social policy enjoys an implied exclusion from the antitrust laws.

The California Chamber of Commerce is mindful of the plight of local government in fashioning laws to protect the health, safety, and welfare of its residents. The test established in the court below, however, goes much too far in protecting the police power of local governments. On its face, the court's test is not expressly limited to the regulation of rental housing. In fact, the court grants the test broad application in order to "provide a workable standard for judging alleged conflict between municipal ordinances and the federal antitrust laws. Opinion below, 37 Cal.3d at 675. In the name of protecting health, safety, and welfare, the city of Berkeley, under this new test, conceivably could enact ordinances fixing the price of almost any good or service from rental housing to bread, milk, and cheese, in the absence of economic or wartime crisis. In essence, we are concerned that some California municipalities may attempt to regulate all aspects of commerce within its city boundaries. Although this may not pose a threat in many states across the nation, in California, especially in cities such as Berkeley, the threat is very real. In sum, the California test is ill-founded and overly broad. We urge this court to step in and set the record straight.

On the other side of the coin, California businessmen are often the beneficiaries of apparently anticompetitive municipal regulation. Because of the confusion created by this test that is diametrically opposed to the precedent established by this Court in *Lafayette* and *Boulder,* however, California businesses are reluctant to jump in and participate with California municipalities in anticompetitive conduct authorized only by municipal ordinances and not by clearly articulated state policies. It is not inconceivable for a Chamber member to be in a situation in which he has expended millions of dollars to enter an anticompetitive venture, authorized solely by a municipal ordinance, only to find himself subject to an injunction and treble damages under the Sherman Act because he relied on erroneous law established by the California Supreme Court. Businessmen in California need to have the law clarified so we can make intelligent business decisions in this regard. If we know that there is a bear trap out in the woods, we can learn to walk around it. If, however, we are blindfolded by this

California court test as we walk out the door, we eventually will get caught in the trap.

Because this California court test will become binding precedent on all lower courts across the nation if this Court summarily dismisses this case, *Hicks v. Miranda,* 422 U.S 332, we urge this Court to fully consider this important case on the merits.

CONCLUSION

The conduct contemplated by the city of Berkeley's rent control ordinance constitutes price-fixing in its purest form. Price-fixing conflicts with the Sherman Act and is therefore preempted under the Supremacy Clause. Moreover, because the city of Berkeley is not acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with municipal regulation, the city cannot be afforded state action immunity under the *Parker* doctrine. The rent control ordinance, therefore, is not saved from Sherman preemption. In addition, a sufficient nexus exists between the challenged rent control ordinance and interstate commerce to invoke federal jurisdiction under the Sherman Act.

Finally, the test established by the California Supreme Court to determine the validity of an anticompetitive municipal ordinance that conflicts with Sherman departs significantly from the precedent firmly established by this Court in *Lafayette, Boulder,* and *Town of Hallie,* and should therefore be overturned by this Court. In light of the aforementioned considerations, the California Chamber of Commerce respectfully urges this Court to note probable jurisdiction and consider this important case on the merits.

Respectfully submitted,

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No. 84-1538

In The

Supreme Court of the United States

October Term, 1984

ALEXANDRA FISHER, et al.,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, et al.,

Appellees.

On Appeal from the Supreme Court
of the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THADDEUS A. FERENC AND RONNIE L. OVERTON IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
INTERESTS OF AMICI	1
OPINION BELOW	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. THE LOCAL GOVERNMENT ANTITRUST ACT OF 1984 ESTABLISHES THAT CONGRESS DID NOT INTEND THAT ALLEGED VIOLATIONS OF THE SHERMAN ACT BY LOCAL GOVERNMENTS ACTING PURSUANT TO THEIR POLICE POWER BE JUDGED BY STANDARDS UNIQUE TO MUNICIPALITIES	6
II. APPLICATION OF TRADITIONAL ANTITRUST RULES TO LOCAL GOVERNMENTS DOES NOT POSE A THREAT TO THE EFFECTIVE USE OF THE POLICE POWER	12
III. THE BERKELEY RENT CONTROL ORDINANCE CAN BE FAIRLY JUDGED BY THE TRADITIONAL "PER SE" STANDARD APPLIED TO PRICE-FIXING ARRANGEMENTS	16
CONCLUSION	24

TABLE OF AUTHORITIES

Cases

Page

Albrecht v. Herald Co., 390 U.S. 145 (1968) 20

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 19, 20

Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) 15

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 13, 17, 24

Community Communications Co. v. Boulder, 455 U.S. 40 (1982) 14

Fisher v. City of Berkeley, 37 Cal. 3d 644 (1984) ..... *passim*

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) 17

International Salt Co. v. United States, 332 U.S. 392 (1947) 15

Lowe v. Securities and Exchange Commission, — U.S. —, 53 U.S.L.W. 4705 (June 11, 1985) 7

National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 468 U.S. —, 104 S. Ct. 2948 (1984) 17

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 11, 15, 20

Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., — U.S. —, 53 U.S.L.W. 4733 (June 11, 1985) 15

Parker v. Brown, 317 U.S. 341 (1943) 13

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 23

Russell v. United States, — U.S. —, 53 U.S.L.W. 4652 (June 3, 1985) 21

TABLE OF AUTHORITIES—Continued

Page

Town of Hallie v. City of Eau Claire, 471 U.S. —, 105 S. Ct. 1713 (1985) 13, 17, 23

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 7, 18, 20

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 17

Statutes

Cal. Health & Safety Code § 50001(c) (West Supp. 1985) 20, 21

§ 50002 20

§ 50003(a) 20, 21

§ 50003(d) 21

§ 50202 21

§ 51600(d) 22

Cal. Health & Safety Code, Division 31 (West 1979) 21

Local Government Antitrust Act of 1984, Pub. L. No. 98-544 (Oct. 24, 1984), 15 U.S.C. §§ 34-36 ..... 5, 6, 14, 24

Rules

United States Supreme Court Rule 36 1

Miscellaneous

Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & Econ. 7 (1966) 18

H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 2 (1984), reprinted in 1984 U.S. Code Cong. & Ad. News 4603 7-15

Hazlett, Resolving the Housing Crisis, "Rent Controls and the Housing Crisis" 282-83 (M. Bruce Johnson ed. 1982) 22, 23

Rahl, Price Competition and the Price-Fixing Rule—Preface and Perspective, 57 Nw. U.L. Rev. 137 (1962) 19

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INTERESTS OF AMICI

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation, Thaddeus A. Ferenc, and Ronnie L. Overton respectfully submit this brief amicus curiae in support of appellants. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting broad public interest. Policy for Pacific Legal Foundation is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that Pacific Legal Foundation's position has broad support within the general community. Pacific Legal Foundation's Board of Trustees has authorized the filing of this brief. Thaddeus A. Ferenc and Ronnie L. Overton are joint owners of a small rental housing property in the City of Berkeley and are plaintiffs in a lawsuit in which they challenge actions taken against them under the Berkeley Rent Stabilization and Eviction for Good Cause Ordinance (Berkeley Ordinance) at issue in this case. Messrs. Ferenc and Overton and their attorneys from Pacific Legal Foundation have gained substantial insight into the working of the Berkeley Ordinance and the need for the protection of the consumer welfare in the Berkeley rental housing market.

These interests and the long-standing public policy perspective of Pacific Legal Foundation in support of the free enterprise system and the protection of consumer welfare by competitive markets will help to provide this Court with a more complete briefing of the interests at stake in this litigation.

———o———

OPINION BELOW

The opinion of the California Supreme Court is reported at 37 Cal. 3d 644 (1984).

———o———

STATEMENT OF THE CASE

The Berkeley Rent Stabilization and Eviction for Good Cause Ordinance was adopted as an initiative measure in June, 1980. Plaintiffs challenged the ordinance as being facially invalid under several constitutional claims. The question of the possible violation of federal antitrust laws was not raised until after a hearing had been granted by the California Supreme Court. *Fisher v. City of Berkeley,* 37 Cal. 3d 644, 710 (1984) (Bird, C.J., concurring). Therefore, without a record, this antitrust challenge is limited to the face of the ordinance.

The California court apparently conceded that even limited to a facial review, the Berkeley Ordinance could not survive a traditional antitrust violation analysis. *Id.* at 666-67, 672, 678. The court, therefore, found it necessary to abandon "traditional antitrust rules" and to adopt a "modified standard" which would "recognize a public welfare 'defense' to alleged violation of the antitrust laws by municipalities." *Id.* at 673.

The Berkeley Ordinance on its face presents at least two serious conflicts with antitrust principles of a type usually considered to be per se violations of the federal law. The first violation is price fixing from the combined effect of Sections 10, 11, and 12 of the ordinance to

fix prices at the level "actually due and payable on, or last preceding, May 31, 1980." Berkeley Ordinance § 10(a). Any allowed adjustments are also fixed through the consideration of nonmarket factors by the landlord or tenant in conjunction with the rent stabilization board. Berkeley Ordinance §§ 11 and 12. The price fixing aspect of the ordinance operates to protect tenants against "unwarranted rent increases" (Berkeley Ordinance § 3) and to protect landlords against the loss of "a fair return on investment" (Berkeley Ordinance § 12(c)). The second violation which is clear on the face of the ordinance is the requirement that landlords engage in a concerted refusal to deal with any prospective tenants who may be interested in units occupied by existing tenants. Berkeley Ordinance § 13.

Thus, this case is a remarkably simplistic presentation of two very important questions: (1) Did the California Supreme Court apply the correct standard for determining whether municipal ordinances are preempted by federal antitrust laws when those ordinances require conduct which has traditionally been considered to be a per se violation of federal law? (2) Under the proper standard, is the Berkeley Ordinance on its face in conflict with federal antitrust laws?

———o———

SUMMARY OF ARGUMENT

The premise of the California Supreme Court that Congress did not intend that traditional federal antitrust

rules would be applied to municipalities is refuted by the Local Government Antitrust Act of 1984. That statute allows special considerations for municipalities only by limiting the relief which can be granted, and the legislative history makes clear that Congress considered and rejected the alternative of modifying existing standards for establishing violations by municipalities of federal antitrust laws.

The provisions of the Local Government Antitrust Act of 1984 combined with the availability of state action immunity, the burdens on any plaintiffs suing municipalities, and the discretion available to the court when fashioning injunctive relief substantially eliminate any purported threat to local governments. Only speculation suggests that the national policy favoring competitive markets cannot be accommodated by reasonable administration of the local police power.

The traditional per se standard of violation applied to price-fixing arrangements may be appropriately applied to the Berkeley Ordinance which on its face violates the principles underlying the antitrust laws and codifies anticompetitive actions to be expected of private persons attempting to protect their market position in the situation where supply is insufficient to meet demand.

———o———

ARGUMENT

I

THE LOCAL GOVERNMENT ANTITRUST ACT OF 1984 ESTABLISHES THAT CONGRESS DID NOT INTEND THAT ALLEGED VIOLATIONS OF THE SHERMAN ACT BY LOCAL GOVERNMENTS ACTING PURSUANT TO THEIR POLICE POWER BE JUDGED BY STANDARDS UNIQUE TO MUNICIPALITIES

The California Supreme Court described its decision in this case as a rejection of "[t]raditional antitrust rules [which] have been fashioned over the years in the context of private business regulation" (*Fisher v. City of Berkeley,* 37 Cal. 3d at 664) and the adoption instead of "a test modeled after the court's commerce clause cases" (*id.* at 675). This dramatic change in federal antitrust principles was justified on the basis of that court's conclusion that "most municipal actions would be found to violate the law" under traditional rules and the result would be that "'a municipality's power to regulate the economy would be all but destroyed.'" *Id.* at 672. The court justified its course of conduct by suggesting that it "cannot believe that Congress intended such results." *Id.* However, in a most exceptional oversight the California Supreme Court ignored a federal statute approved two months prior to its decision, by which Congress addressed the same concerns, rejected the solution adopted by the state court, and enacted an alternative method to limit the effect of antitrust liability on municipalities.

The Local Government Antitrust Act of 1984, Pub. L. No. 98-544 (Oct. 24, 1984), 15 U.S.C. §§ 34-36 (Local Government Act), was enacted to address the concerns that

"antitrust suits, and threatened suits . . . could undermine a local government's ability to govern in the public interest." H.R. Rep. No. 98-965, 98th Cong., 2nd Sess. 2 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 4603 (Leg. Hist.). This statute controls the issue presented in this case. The city's claim that relying on competition to protect the public interest is inappropriate when applied to limit the exercise of the local police power is a challenge to the policy underlying the federal antitrust laws and therefore is a question for resolution by Congress and not by the judiciary. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 221-22 (1940). Congress has now expressly considered and has decided how to accommodate the local police power with the federal antitrust laws.

"The task of defining the objectives of public policy and weighing the relative merits of alternative means of reaching those objectives belongs to the legislature." *Lowe v. Securities and Exchange Commission,* — U.S. —, 53 U.S.L.W. 4705, 4713 (June 11, 1985) (White, J., concurring). The legislative history of the Local Government Act makes clear that Congress has completed this task. After fully considering the concerns raised by the California Supreme Court, Congress rejected proposals similar to that adopted by the California court which would have amended the law to preclude or to reduce the legal bases on which to raise antitrust challenges to actions by municipalities. Six different bills proposed alternative means for relief for local governments. The different proposals included:

"A. Municipal immunity tied to State immunity

"B. Municipal immunity based upon the nature of the activity

"C. Municipal Rule of Reason Test

"D. Remedy approach." Leg. Hist. at 4614-19.

After full consideration of the various options, Congress adopted in the Local Government Act only the "remedy approach." Expanded municipal immunities were rejected in the face of testimony on behalf of states that the concept undermined the authority of the states in a federal system of dual sovereigns. Leg. Hist. at 4612 n.19. The "Municipal Rule of Reason" test which was considered but not adopted is essentially the same as the "modified standard" adopted by the California Supreme Court. Although that court claimed to "decline to analyze municipal conduct under a so-called 'municipal rule of reason'" (*Fisher*, 37 Cal. 3d at 673-74 n.25, 675-76 n.28) that term is general in nature and covers "several proposals." Leg. Hist. at 4616. The concept as described in the legislative history is a test which asks:

> "[C]ould the unit of local government have achieved its safety, its health, its public welfare objective in a way less retrictive [*sic*] of the Federal interest in competition, less harmful to the consumer." Leg. Hist. at 4617.

This test closely tracks that set forth by the California Supreme Court which asks if "the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies." *Fisher*, 37 Cal. 3d at 675. Congress, therefore, in rejecting the "municipal rule of reason test" rejected the very test adopted by the California Supreme Court. Moreover, the legislative history makes clear that Congress also considered and rejected the rationale the California Supreme Court used to propose a different standard.

In rejecting the use of traditional antitrust rules the state court focused its attention only on its concern over "unwarranted interference with a municipal government's legitimate exercise of its police power." *Id.* at 673. The court simply rejected out of hand the notion that legitimate interests of market participants consistent with federal antitrust policies might be frustrated by municipal actions. According to the California Supreme Court "[t]here is nothing to suggest" such concerns. *Id.* at 669. Congress on the other hand clearly recognized the competing interests and focused its concern on the need to "weigh the chilling effect of potential or actual antiturst [*sic*] litigation on local governments and their officials against the need to preserve some right of redress for private persons (including consumers) harmed by anticompetitive conduct." Leg. Hist. at 4614. After weighing these competing considerations Congress rejected proposals to cut back on the ability to maintain traditional antitrust actions against municipalities in favor of cutting back on the remedies available in such actions.

> "The Subcommittee did not adopt the concept of a ban against private actions aimed at municipalities and their officials. The role of 'private attorneys general' in the antitrust enforcement scheme remains central. If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time. The record does support, however, the notion that municipalities—and their taxpayers who must ultimately shoulder the burden—should not be subject to punitive sanctions in the form of treble damages.

> "The Subcommittee considered permitting actual damage recovery by private persons injured by local governmental actions. . . .
>
> "The Subcommittee was persuaded, however, that the most balanced legislative response at this time would be to restrict private remedies to injunctive relief." Leg. Hist. at 4619.

The "chilling effect" on local government from the application of the antitrust laws which Congress recognized and considered is the same consideration which led the California Supreme Court to conclude that it needed to develop new substantive standards by which to judge alleged violations of antitrust laws by municipalities. *Fisher,* 37 Cal. 3d at 672. Congress, however, after balancing the competing interests chose to grant relief in a different way by modifying the remedy and leaving alone the standards for determining a violation.

> "The bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law. For example, there will be no change in the substantive antitrust law applicable to local governments, or persons with whom they deal, in suits for injunctive relief under Section 16 of the Clayton Act." Leg. Hist. at 4603.

There can be no question that Congress clearly understood that "the substantive antitrust law applicable to local governments" would be the traditional "per se" test and when appropriate the traditional "rule of reason" test which "weigh the procompetitive and anticompetitive tendencies of a particular practice in deciding whether that conduct violates the antitrust laws." Leg. Hist. at 4616.

The legislative history also makes clear that Congress considered and rejected the approach of "'legislatively

overruling'" the principle established by this Court in *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978), "that 'social' or 'public interest' values" cannot be used to justify anticompetitive conduct in violation of the Sherman Act. Leg. Hist. at 4617. This Court ruled in *National Society of Professional Engineers* that the substantive standard to be applied is whether the action "is one that promotes competition or one that suppresses [it]" (435 U.S. at 691) and that "that policy decision has been made by Congress" (*id.* at 692). Congress' refusal to change that policy by incorporating in the Local Government Act any provision for a "social" or "public interest" defense is a direct contradiction of the California Supreme Court's decision that it "must develop tests that recognize a public welfare 'defense' to alleged violation of the antitrust laws by municipalities." *Fisher,* 37 Cal. 3d at 673. Congress was not willing to risk the national policy favoring competition by providing such a lower standard for the conduct of municipal officers. Congress simply rejected the notion that "the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury." Leg. Hist. at 4619. After careful consideration of the same arguments which the California Supreme Court found persuasive, Congress concluded that the national policy favoring competition could only be protected from local political influences, whether well meaning or not, by requiring a showing that the local government's actions were taken to protect competition.

It is not surprising that the Congress and the California Supreme Court differed considerably in the weight

each gave to the competing national and local interests involved. The state court gave heavy weight to the protection of municipal powers and ignored those interests which are protected by the antitrust laws. Congress on the other hand recognized and considered both interests to be important. To protect both interests Congress of necessity reached a result markedly different from that of the California Supreme Court. By ignoring the Local Government Act the California Supreme Court has in effect granted double relief to municipalities. The combined result of the limitation of remedies enacted by Congress and the limitation on the ability to state a claim under the ruling of the California court will be that few, if any, antitrust suits will ever be brought against local governments. That result is contrary to the intent of Congress that antitrust actions against municipalities be allowed to continue and that the "'private attorney general'" role is to "remain[] central" in the antitrust "enforcement scheme" which is "aimed at municipalities." Leg. Hist. at 4619.

II

APPLICATION OF TRADITIONAL ANTITRUST RULES TO LOCAL GOVERNMENTS DOES NOT POSE A THREAT TO THE EFFECTIVE USE OF THE POLICE POWER

The argument that the application of traditional antitrust rules to municipalities will destroy the police power (*Fisher*, 37 Cal. 3d at 672) rests on the assumption that many plaintiffs will obtain significant relief against many municipalities after proving that many municipal ordinances violate the Sherman Act. There is at present no basis for such an assumption.

Initially, the state action exemption established by *Parker v. Brown*, 317 U.S. 341 (1943), continues to protect municipalities whose conduct is consistent with "clearly articulated state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. —, 105 S. Ct. 1713, 1721 (1985). The California court's desire for recognition of the difference in motives between municipalities and "unrestrained business competitors" (*Fisher*, 37 Cal. 3d at 668-69) is accommodated under this state action exemption when the municipality is sued as an actor. Because of the recognized differences in motives, the state action exemption is more readily applied for the benefit of municipalities without the requirement for the showing of active state supervision. *Town of Hallie*, 105 S. Ct. at 1720-21. For the many circumstances in which municipalities act under state authorization, it is not a significant burden to require that that authorization "show that '"the legislature contemplated the kind of action complained of"'" (*id.* at 1719, quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978), quoting the decision of the Court of Appeals, 532 F.2d 431, 434 (5th Cir. 1976)) before allowing municipalities to establish economic policy contrary to that set by Congress. "Such a proviso recognizes that local governments are not federal agencies or a third sovereign form of government." Leg. Hist. at 4614 n.19.

Given the breadth of the state action exemption, the asserted problem is reduced to circumstances of "home rule" municipalities acting without explicit state authority. As the Berkeley Ordinance demonstrates, it is in just such circumstances that local market participants may be most likely to be able to obtain economic protection

based solely on the parochial interests of a local community. It is also in such circumstances that other persons wishing to compete for a scarce resource and the public welfare interest in an adequate supply of the resource may be most in need of the protection of the antitrust laws.

Any asserted serious threat to the legitimate authority of local governments in these circumstances has not materialized in the years since this Court's decision in *Community Communications Co. v. Boulder,* 455 U.S. 40 (1982). Leg. Hist. at 4612-13. Now as a result of the Local Government Antitrust Act of 1984 Congress has acted "to readjust the litigation advantages and disadvantages more equitably for local government defendants." Leg. Hist. at 4620. Municipalities have been granted significant relief which reduces to a minimum the number of antitrust suits which can reasonably be expected to be brought against them. By limiting the remedy to injunctive relief and not allowing costs or attorneys' fees, Congress expected that future litigation will be limited to those situations where the actions of local governments are such serious intrusions into the competitive market that potential litigants can justify the *present* very high cost of litigation with the expected *future* increase in economic benefit from the limited remedy of an injunction. The legislative history even suggests that of those few who can justify initiating such litigation many will be screened out after a motion for preliminary injunction when the plaintiff must face the reality of an initial setback, if the injunction is denied, or of the cost of posting a substantial bond if the injunction is granted. Leg. Hist. at 4619-20.

Even when a challenge is maintained, municipalities are not helpless in the hands of the courts . "A plaintiff

seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.,* — U.S. —, 53 U.S.L.W. 4733 (June 11, 1985). Other than the relatively few circumstances when the per se rule should apply, the actions of municipalities would be measured under the rule of reason which this Court has demonstrated is sufficiently flexible to accommodate exceptional circumstances where the need for anticompetitive regulation can be justified on a market basis. *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 U.S. 1 (1979). Moreover, the only relief available falls "under the courts' equitable jurisdiction" (Leg. Hist. at 4620), leaving the court discretion to recognize other regulatory actions and to protect legitimate local interests when fashioning appropriate relief. *See National Society of Professional Engineers,* 435 U.S. at 698-99. Although the relief must restore competition, it may be "fit [to] the exigencies of the particular case." *International Salt Co. v. United States,* 332 U.S. 392, 401 (1947).

Only pure speculation suggests that local governments will be unable to conduct their affairs without engaging in repeated, unreasonable restraints on trade. Moreover, no showing has been made that despite limited application of the antitrust laws to local governments and after the substantial relief for municipalities under the Local Government Antitrust Act there can be any real concern that "application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate municipal regulation." *Fisher,* 37 Cal. 3d at 664. It is all too early to give serious cre-

dence to the cry that the national policy favoring competitive markets cannot be accommodated by reasonable administration of the local police power.

III

THE BERKELEY RENT CONTROL ORDINANCE CAN BE FAIRLY JUDGED BY THE TRADITIONAL "PER SE" STANDARD APPLIED TO PRICE-FIXING ARRANGEMENTS

Although the California Supreme Court developed an elaborate criticism of the application of the "per se" rule to the Berkeley Ordinance (*Fisher,* 37 Cal. 3d at 667-71), it does not suggest why municipalities must engage in blatant price-fixing schemes in the first place. On the fundamental question of why the city had to adopt a practice which is considered so antithetical to the national policy favoring competition that it has been declared a "per se" violation, the court relies solely on its observation that "plaintiffs suggest no alternative, equally effective approach to achieving defendants' legitimate local purposes." *Id.* at 677. While this may be an accurate description of the record of this case (particularly since the California Supreme Court allowed the issue to be raised by an amicus curiae brief in that court with the parties having no opportunity to make a record on the issue, *see id.* at 710-13, Bird, C.J., concurring) it hardly justifies the conclusion that the national policy favoring competion should be sacrificed on the assumption that the city had no alternative but to adopt the most anticompetitive program possible.[1].

---

[1] No discussion supports the California Court's exceptional holding that the burden rests on plaintiffs to prove the existence

(Continued on following page)

The analysis of the California Supreme Court is seriously flawed because it assumes that the Berkeley Ordinance has some legitimate purpose other than eliminating some form of competition. This assumption has no merit. "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *United States v. Trenton Potteries Co.,* 273 U.S. 392, 397 (1927). This general rule finds no exception in the Berkeley Ordinance which on its face sets its purpose to be the elimination of price competition.

The ordinance indicates that the "unwarranted rent increases" to be prevented are simply those increases caused by the pressure of demand against supply. The "findings" set forth in Section 2 of the ordinance mention "steadily rising rents, a shortage of decent housing, and an increased deterioration of the existing housing stock in the City." This conclusion is reinforced by the reference in Section 3 to a "housing crisis" which is apparently defined in Section 6(q) as being less than a 5% vacancy

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of alternative means "that would have a less intrusive impact on federal antitrust policies." *Fisher,* 37 Cal. 3d at 675. No reason appears to shift to plaintiffs a burden which has traditionally rested on defendants to justify anticompetitive conduct under an antitrust challenge and to justify discrimination against commerce under a Commerce Clause challenge. *See National Collegiate Athletic Association v. Board of Regents of University of Oklahoma,* 468 U.S. —, 104 S. Ct. 2948, 2967 (1984); *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 353 (1977). Considering the recognition by both Congress and this Court that local governments might discount national and statewide priorities to favor parochial interests (see Leg. Hist. at 4619; *Town of Hallie,* 105 S. Ct. at 1721; *City of Lafayette,* 435 U.S. at 410) municipal defendants should continue to bear the burden of justifying anticompetitive conduct.

rate. If the pricing restrictions may be lifted as provided in Section 6(q) when more rental units are available, then the reason for the price restriction must be an undersupply of rental units. Therefore, on its face the ordinance suggests that it was adopted because in the competitive housing market "a pattern of steadily rising rents" was occurring in response to some manner of housing "shortage." In simple terms, the ordinance states that its purpose is to address the effects of price competition in the rental housing market. It attempts to achieve this purpose by directly prohibiting any price competition. There is no attempt to justify this ordinance on other grounds; *e.g.*, fraud, discrimination, or other abusive practices. It is justified solely on a "cry of ruinous competition and competitive evils" which Congress has not allowed as a defense to price-fixing claims. *Socony*, 310 U.S. at 221.

The California court's analysis is also flawed because it fails to comprehend that the essence of price competition is competition between tenant and other tenants and between landlord and other landlords. Instead the opinion below treats price competition only as a consideration in the relationship between a landlord and a tenant and, therefore, does not recognize that the Berkeley Ordinance, which purports to address a problem between landlord and tenant, in fact prohibits all price competition among landlords and among tenants.

Consumer welfare is dependent upon price competition and "the legislative history of the Sherman Act shows consumer welfare to be the decisive value." Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7, 11 (1966). The Berkeley Ordinance does not provide protection for the general consumer welfare. It

merely protects the parochial interests of certain Berkeley residents who do not wish to have rival tenants compete for the housing resource. The ordinance in effect authorizes a cartel of existing tenants and creates a monopsony in the market for the rental units they occupy. The court below by focusing only on the landlord-tenant relationship ignored the real victims of the loss of competition—the prospective new tenants who are prohibited from competing for limited rental housing.

The analysis of the California Supreme Court not only fails to recognize the importance of price competition in protecting consumer welfare, it also treats price as if it were an independent concept without serious market ramifications beyond the direct relationships of individual landlords with individual tenants. That court's suggestion that the only basis for concern with price-fixing arrangements is that "unrestrained business competitors" cannot be trusted to maintain "reasonable" prices for the tenants (*Fisher*, 37 Cal. 3d at 668-69) ignores the teaching of this Court that the illegality of price fixing " 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' " *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982), quoting Rahl, *Price Competition and the Price-Fixing Rule—Preface and Perspective*, 57 Nw. U.L. Rev. 137, 142 (1962).

The public benefits of price competition far exceed the concept of "reasonable prices" and include such benefits as variety, quality, and availability of products to be achieved by encouraging experimentation, new developments, and entry into the market. *Id.* Lack of price competition may destroy "services and conveniences which

consumers desire and for which they are willing to pay." *Albrecht v. Herald Co.,* 390 U.S. 145, 152-53 (1968). Destruction of price competition also " 'impedes the ordinary give and take of the market place,' and substantially deprives the customer of 'the ability to utilize and compare prices in selecting [rental housing].' " *National Society of Professional Engineers,* 435 U.S. at 692-93.

Price-fixing schemes are uniformly condemned not because market participants cannot be trusted to set reasonable prices but "because of their actual or potential threat to the central nervous system of the economy." *Socony,* 310 U.S. at 226 n.59. Whether a price-fixing scheme is public or private and whether it is adopted for well-meaning or selfish ends, its result is always pernicious, and it cannot be condoned because of the certainty that it will destroy the benefits of a free competitive market. *Maricopa,* 457 U.S. at 351; *National Society of Professional Engineers,* 435 U.S. at 693-94; *Socony,* 310 U.S. at 221-22.

Thus, California state policy is to promote not only affordable rents but also "a decent home and a satisfying environment." Cal. Health & Safety Code § 50002 (West Supp. 1985). Such concepts vary with individuals and can only be achieved by allowing "the housing consumer [to] effectively choose within the free marketplace." Cal. Health & Safety Code § 50001(c) (West Supp. 1985).

The circumstances which led to the adoption of the Berkeley Ordinance are nothing more than the effect on that community of a recognized statewide problem that a "present and future shortage of supply in relation to demand . . . creates inflation in the cost of housing, by

reason of its scarcity, which tends to decrease the relative affordability of the state's housing supply for all its residents." Cal. Health & Safety Code § 50003(a) (West Supp. 1985). In response the state enacted extensive legislation to provide financial assistance to tenants and to encourage the development of new housing and the rehabilitation of older housing. *See generally* Cal. Health & Safety Code, Division 31 (West 1979) (Housing and Home Finance). In order to remedy the "shortages" the state adopted a "comprehensive and balanced approach to the solution of housing problems of the people of this state" (Cal. Health & Safety Code § 50003(d) (West Supp. 1985)) which expressly encouraged the development of "[a] healthy housing market . . . in which the housing consumer may effectively choose within the free marketplace" (Cal. Health & Safety Code § 50001(c) (West Supp. 1985)), and which expressly did *not* "authorize the imposition of rent regulations or controls" except for housing units receiving government assistance (Cal. Health & Safety Code § 50202 (West Supp. 1985)).[2]

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[2] Given the state policy that the shortage of rental housing is to be addressed by tenant subsidies, financing assistance, and other efforts to encourage development of new housing and that rent control of private housing operating without government assistance is not authorized by the state housing policy, there can be no reasonable argument that the Berkeley Ordinance follows a "clearly articulated state policy." Likewise there can be no doubt that the Berkeley Ordinance regulates an activity in interstate commerce. "The rental of real estate is unquestionably such an activity." *Russell v. United States,* — U.S. —, 53 U.S.L.W. 4652, 4653 (June 3, 1985). It is also clear that the ordinance requires that the price fixing be achieved through several combinations; among landlords (Section 10(a)), between the rent board and landlords or tenants (Section 12(a)), and between the rent board and other persons (Section 11(b)).

The Berkeley Ordinance, however, simply codifies the result that would be sought by private parties engaging in anticompetitive activity to protect their market position. Existing tenants are protected against "unwarranted" (market generated) rent increases (Berkeley Ordinance §§ 10, 11, and 12) and from competition by rival tenants who may wish to offer a bit more for their attractive rental. Berkeley Ordinance § 13. Landlords are supposed to be granted a "fair return on investment." Berkeley Ordinance § 12(c). Existing housing units put on the market for the first time must conform to the pricing practices of other landlords. Berkeley Ordinance § 10(a). As a practical matter the below market return and investment risk for new investors associated with rent control means little if any new construction. Cal. Health & Safety Code § 51600(d) (West Supp. 1985). *See also* Hazlett, *Resolving the Housing Crisis*, "Rent Controls and the Housing Crisis" 282-83 (M. Bruce Johnson ed. 1982). Therefore, Berkeley has responded to a statewide problem by an ordinance which requires anticompetitive conduct intended solely to protect Berkeley residents from the competitive market in rental housing. The winners are the present residents with protected market positions and the losers are the many, many others who would like to join the community and to enter the market on a fair (competitive) basis.

On its face the Berkeley Ordinance will do nothing to increase the number of rental units in order to reduce the "shortage." Prices fixed below market levels cause shortages; they do not reduce shortages.

> "A price suppressed below market-clearing levels will spontaneously create a shortage (excess demand at the controlled price), and consumers will *not* get the rental housing for which they are both able and *willing* to pay. This classic inefficiency is scrutinized in any standard micro-economics text." Hazlett, *supra*, at 278 (emphasis in original).

The state established alternatives of rent subsidies, government sponsored housing, financing assistance, and incentives to construct rental housing will work to reduce "shortage" but they will not protect the market position of existing Berkeley residents. In comparison the city's choice of a price-fixing program is suspect on its face. It is an example that "[t]he only real danger is that [municipalities] will seek to further purely parochial public interests at the expense of more overriding state goals." *Town of Hallie*, 105 S. Ct. at 1721.[3]

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[3] Although claiming to rest its new antitrust standard on this Court's Commerce Clause cases (*Fisher*, 37 Cal. 3d at 674), the California court failed to follow the teachings of this Court that under a Commerce Clause analysis "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Economic protectionism cannot be justified even under the Commerce Clause as the means to reach otherwise acceptable local ends. *Id.* at 626. The "problem" in Berkeley as set out on the face of the ordinance is that prospective tenants from outside the city want to compete with present residents of rental housing for a limited housing resource. *See, supra*, at 17-19. Because Berkeley is the location of the main campus of the University of California, many of these prospective tenants are from out of state. By not allowing outsiders seeking rental housing to compete with existing residents by offering a higher price (Berkeley Ordinance § 10) or on any other competitive basis (Berkeley Ordinance § 13), the ordinance ensures that existing residents have absolute preference over persons coming from outside of the city. Imposing the full burden of conserving a scarce resource on persons outside the city is an act which would be per se invalid under a Commerce Clause analysis as an "attempt by one [city] to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Philadelphia v. New Jersey*, 437 U.S. at 628.

Application of the "per se" rule is particularly appropriate to the Berkeley Ordinance which indicates on its face that it was adopted for purposes contrary to the principles underlying the Sherman Act. As the California Supreme Court readily acknowledged, the ordinance requires not only that the present tenants in the market be protected from price competition, but also that the present landlords be protected by a guarantee of a "fair return on his investment." *Fisher,* 37 Cal. 3d at 670. Applying the per se rule to invalidate a local ordinance which on its face states that it was adopted for the purpose of protecting the economic position of present market participants against competition would not constitute a serious incursion into the reasonable exercise of the local police power.

> "If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to the anticompetitive effect, a serious chink in the armour of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *City of Lafayette,* 435 U.S. at 410.

———o———

CONCLUSION

Congress has responded to the expression of concerns over potential conflicts between the federal antitrust laws and the local police power. In adopting the Local Government Antitrust Act of 1984 Congress rejected alternative means of reducing the potential for conflict which were similar to the "modified standard" adopted by the California Supreme Court in this case. Given this action

by Congress and the lack of any showing that the application of the traditional antitrust rules to municipalities now poses any serious threat to the reasonable exercise of the local police power, this Court should reverse the decision by the California Supreme Court, reaffirm that traditional antitrust rules apply to municipalities, and declare the price-fixing requirements of the Berkeley Rent Stabilization and Eviction for Good Cause Ordinance invalid for requiring per se violations of the federal antitrust laws.

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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN AND ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

VS.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,

Appellees.

On Appeal From The Supreme Court of the State of California

BRIEF OF CALIFORNIA HOUSING COUNCIL, INC. AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE CALIFORNIA SUPREME COURT SHOULD HAVE APPLIED TRADITIONAL SHERMAN ACT ANALYSIS TO THE BERKELEY RENT CONTROL ORDINANCE.	4
A. Berkeley's ordinance is not exempt from the Sherman Act.	4
B. Under the doctrine of federal supremacy the California Supreme Court cannot ignore the Sherman Act's unequivocal policy favoring competition.	6
II. BERKELEY'S RENT CONTROL ORDINANCE CONSTITUTES A *PER SE* VIOLATION OF THE SHERMAN ACT.	7
A. An arrangement that fixes prices is *per se* unlawful.	7
B. Berkeley's rent control ordinance fixes prices for rental housing.	9
C. Berkeley's ordinance causes all of the adverse economic effects on competition, supply, capital investment, and innovation that led this Court to enunciate the *per se* rule against price fixing.	10
D. The fact that this Court has not previously dealt with rent control does not reduce the propriety of applying the *per se* rule.	13
III. SUBJECTING MUNICIPALITIES TO TRADITIONAL ANTITRUST PRINCIPLES PRESERVES THE STRUCTURE OF OUR FEDERAL SYSTEM AND ENHANCES PREDICTABILITY; IT DOES NOT HINDER PERFORMANCE OF LOCAL GOVERNMENT.	13
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 8, 9, 13, 14

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) 8

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 14

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 5

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) 10

Fisher v. City of Berkeley, 37 Cal. 3d 644 (1984) 7

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) ... 8

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 7

NCAA v. Board of Regents of University of Oklahoma, 104 S. Ct. 2948 (1984) 13

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 7, 8, 13

Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958) 5

Parker v. Brown, 317 U.S. 341 (1943) 3

Rice v. Norman Williams Co., 458 U.S. 654 (1982) ... 10

Standard Oil Co. v. FTC, 340 U.S. 231 (1950) 8

Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985) 5

United States v. Container Corp., 393 U.S. 333 (1969) 8

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 8, 9, 13

United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897) 8

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 8, 13

Table of Authorities Continued

Page

CONSTITUTIONAL PROVISIONS AND STATUTES:

California Constitution, Article XI, Section 7 5

Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (codified at 15 U.S.C. §§ 34-36 (1984)) 15, 16

Cal. Water Code § 31136 (West 1984) 15

Conn. Gen Stat. Ann. § 7-148(b)-(f) (West Supp. 1985) 15

Mass. Gen. Laws Ann. ch. 842, §§ 1-1 to 1-14 (West Supp. 1985) 15

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MISCELLANEOUS:

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1 I. Lowry, Rental Housing in New York City (1970) . 11

Table of Authorities Continued

	Page
Moorhouse, *Optimal Housing Maintenance Under Rent Control*, 29 Southern Econ. J. 93 (1972)	11
Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691 (1983)	12
R. Posner, Antitrust Cases, Economic Notes, and Other Materials 91 (1974)	10
Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517 (1984)	12
F. Scherer, Industrial Market Structure and Economic Performance 297 (2d ed. 1970)	10
U.S. Dept. of Housing and Urban Development, Housing in the Seventies (1974)	11

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Appellees.

On Appeal From The Supreme Court Of The State Of California

BRIEF OF CALIFORNIA HOUSING COUNCIL, INC. AS *AMICUS CURIAE*

This brief is submitted with the written consent of all parties filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The California Housing Council, Inc. (the "Council") is a nonprofit association of owners, managers and developers of rental property. The 125 individual and organizational members of the Council own or manage approximately 300,000 rental housing units in California. Since its formation in 1975, the Council has been continously and extensively involved in rent control issues at the federal, state and local levels.

The issue in this case, whether the Sherman Act preempts the City of Berkeley's rent control ordinance, is of major importance to the Council. Although in the long run the burden of rent control falls principally on would-be renters denied access to housing, the initial burden falls directly on those who own, operate, and develop that housing. The Council believes that its experience and perspective will materially aid this Court in understanding the impact of displacing price competition in rental housing with municipal price fixing.

SUMMARY OF ARGUMENT

Congress, through the Sherman Act, determined that a system of economic competition among suppliers of goods would best serve the nation's long-term economic interests. The residents of the City of Berkeley, California, decided through the initiative process that, instead of competition, a system of price controls should govern the provision of most rental housing.

First, the Court must decide whether Berkeley can ignore the Sherman Act's mandate of competition.

More than forty years ago in *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that Congress did not intend states, as sovereign entities, to be subject to the Sherman Act. However, this Court has ruled repeatedly over the past decade that a municipality is not sovereign and may not claim the state action exemption unless it is acting pursuant to a "clearly expressed" state policy. The State of California has not expressed a policy authorizing municipal rent control.

The court below discarded this Court's prior decisions and ruled that Berkeley's rent control ordinance overrides the Sherman Act's mandate of competition on the ground that a municipality's general police power protects such ordinances as long as they are even-handed. This standardless approach turns the Supremacy Clause of the Constitution on its head.

Under principles long settled by this Court, Berkeley is subject to the Sherman Act until such time as the California legislature, or Congress itself, decides to confer antitrust exemption.

Second, the Court must decide whether the Berkeley rent control ordinance violates the Sherman Act.

Had the renters of Berkeley gathered together in a broad agreement to restrict price competition for rental housing, their agreement would constitute a classic *per se* violation of the Sherman Act. It is no less so merely because they have through the initiative process caused their city to impose and enforce price restrictions on rental housing.

Rent control imposed on landlords is no less objectionable than a minimum price agreement among renters. Rent control reduces the flow of capital into rental housing, discourages maintenance and new construction, and retards the mobility of labor by subsidizing those who stay in place. The economic distortions caused by rent control may serve the parochial interest of those who secure them, but they disserve the national objective of a free and robust competitive economy. Under classic antitrust precedent such an ordinance is *per se* unlawful.

To permit subjective judicial balancing of local social goals to erode the mandates of the federal antitrust laws will destroy the predictability of the antitrust laws and blur the lines of responsibility among Congress, the sovereign states, and the courts. Requiring municipalities to abide by the antitrust laws where they are not exempted by their sovereign states does not impede the proper functioning of local government.

I. The California Supreme Court Should Have Applied Traditional Sherman Act Analysis To The Berkeley Rent Control Ordinance.

A. Berkeley's ordinance is not exempt from the Sherman Act.

Congress has made competition the law of the land.

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).

A municipality is fully subject to the Sherman Act unless the legislature of the state in which the city lies exempts it pursuant to a "clearly expressed state policy," *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1717 (1985).

California has not expressed a policy to displace competition in private rental housing. Article XI, Section 7 of the California Constitution, which empowers municipalities to "make and enforce within [their] limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws," is no more a policy to displace competition than was the home rule authority that this Court held in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), was insufficient to confer the state action exemption.

Congress could exempt municipalities from the antitrust laws. Indeed, last year Congress considered six bills that would have altered traditional antitrust rules as applied to municipalities. H.R. Rep. No. 965, 98th Cong., 2d Sess. *reprinted in* 1984 U.S. Code Cong. & Ad. News 4602. One proposal would have made municipal immunity coextensive with state immunity, *id.* at 13, another would have exempted non-commercial activity, *id.* at 14, and still another

would have enacted a loose balancing test of the sort adopted by the California Supreme Court, *id.* at 15-17.

After receiving extensive testimony and giving careful consideration to these bills, Congress found no warrant to exempt or to create special substantive antitrust rules for municipalities.

> If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary competitive injury, it would simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.

Id. at 18. Significantly, Congress concluded that any change in the substantive antitrust rules ran the "risk of varying and uncertain application by the courts." *Id.*

B. Under the doctrine of federal supremacy the California Supreme Court cannot ignore the Sherman Act's unequivocal policy favoring competition.

Contrary to the Sherman Act's clear mandate of competition, the California Supreme Court patched together a formula from several lines of constitutional and statutory cases to test the legality of Berkeley's ordinance. Specifically, it held that

> if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it *must be upheld* against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.

Fisher v. City of Berkeley, 37 Cal. 3d 644, 675 (1984); Appendix A to Jurisdictional Statement at A-31 (footnotes omitted) (emphasis added).

The California court's formula is striking in its departure from the Sherman Act's focus on competition. The California court would require only that a local law be weighed against what it delicately styles an "impact on federal antitrust policies" — in plain words, a violation of the Sherman Act.

Such an approach might be appropriate where the municipality attempts to regulate a subject on which Congress has not spoken. For example, where the local regulatory action is alleged to violate the Commerce Clause, the Court has engaged in a balancing of interests. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

But where a local ordinance conflicts with a specific and explicit federal statute such as the Sherman Act, the ordinance must be struck down. Congress has spoken loudly, clearly, and repeatedly in favor of competition. It has left no room for balancing price competition against a municipality's police power interests.

The California formula turns the Supremacy Clause on its head and *subordinates* the Sherman Act to any "legitimate" police power interest. In fact, the California court permits the Sherman Act's "mandate of competition" to be carried out *only* when it does not in any way impede full achievement of the local purpose. Its ruling that prices fixed by Berkeley's ordinance are justified by local policy goals is "nothing less than a frontal assault on the basic policy of the Sherman Act. . . . [That] statutory policy precludes inquiry into the question of whether competition is good or bad." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978).

II. Berkeley's Rent Control Ordinance Constitutes A *Per Se* Violation Of The Sherman Act.

A. An arrangement that fixes prices is *per se* unlawful.

As this Court has repeatedly recognized: " 'Price is the central nervous system of the economy' . . . and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers v. United States*, 435 U.S. at 692, quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940) and *United States v. Container Corp.*, 393 U.S. 333, 337 (1969). Any arrangement "raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 223.

The harm lies not in the purpose of the price fixer but in the effect of price fixing on competition, since "[t]he heart of our national economic policy long has been faith in the value of competition." *National Society of Professional Engineers v. United States*, 435 U.S. at 695, quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1950). It has been established for almost ninety years that the "reasonableness" of a fixed price or its possible justifications have no bearing on the appropriateness of applying the *per se* rule. *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 & n.23 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980); *National Society of Professional Engineers v. United States*, 435 U.S. at 692-96; *Socony-Vacuum Oil Co. v. United States*, 310 U.S. at 226 n.59; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-401 (1927); *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 339-41 (1897). Whether prices are imposed by a bar association on lawyers, *see Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), by doctors voluntarily upon themselves, *see Arizona v. Maricopa County Medical Society*, *supra*, by manufacturers in secret agreement, *see United States v. Socony-Vacuum Oil Co.*, *supra*, or by a city on local landlords, fixed prices are all *per se* illegal.

B. Berkeley's rent control ordinance fixes prices for rental housing.

The Berkeley ordinance fixes prices at 1980 levels, with certain adjustments. Had the residents of Berkeley, as renters, conspired and agreed as a group to the maximum prices that they would pay for rental housing, no one could dispute that such agreement would constitute a *per se* violation of the Sherman Act. The fact that the residents of Berkeley chose the initiative process and the municipal government as the vehicles for implementing and enforcing this "agreement" in no way lessens its *per se* nature.[1]

The power of the City of Berkeley as a governmental entity to compel compliance by all landlords with a schedule of maximum prices changes the efficient workings of the

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[1]In fact, the municipal involvement here makes the effect on competition even more pernicious than the typical price-fixing conspiracy, since it is impossible to "cheat on the cartel." *See* 2 P. Areeda & D. Turner, Antitrust Law ¶ 405(b)2 (1978). A consumer who might be willing to pay more than the fixed price for an apartment is effectively precluded from doing so because a landlord who accepts a higher payment is subject to the criminal penalties imposed by the ordinance.

Thus the detrimental effects on competition are far more severe here than in other instances where this Court has condemned maximum price fixing as *per se* illegal. *Cf. Arizona v. Maricopa County Medical Society, supra* (maximum-fee agreements between foundations and doctors held *per se* unlawful). Since the ordinance compels adherence to artificially depressed price levels under *penalty of law*, the arrangement here is completely coercive and absolutely forecloses competition. *Cf. Arizona v. Maricopa County Medical Society*, 457 U.S. at 357, 360 (Powell, J., dissenting) (noting lack of coercion in that case).

marketplace in the same manner as a horizontal conspiracy among competing landlords to maintain minimum prices. In a minimum price fixing case, the conspiracy raises price, resulting in a restriction of output. *See, e.g.*, 2 P. Areeda & D. Turner, Antitrust Law ¶¶ 403, 405 (1978). In the instant case, the City of Berkeley, in effect acting as a combination of all renters, artificially lowers prices, again resulting in a restriction of output. *See* R. Posner, Antitrust Cases, Economic Notes, and Other Materials 91-93 (1974). *See also* F. Scherer, Industrial Market Structure and Economic Performance 297-313 (2d ed. 1970); 2 P. Areeda & D. Turner, *supra*, ¶ 411(c). Even economists who argue that the harmful effects of maximum price fixing are overstated recognize that maximum price fixing which is a consequence of monopsony must be outlawed. *See* Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 904 (1981).[2]

By imposing rent controls, Berkeley destroys price competition among landlords "as effectively as if [the landlords] had formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911) (Holmes, J.). Thus the ordinance "mandates . . . conduct that necessarily constitutes a violation of the antitrust laws in all cases." *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

C. Berkeley's ordinance causes all of the adverse economic effects on competition, supply, capital investment, and innovation that led this Court to enunciate the *per se* rule against price fixing.

The adverse effects of rent control are well-documented. Study after study has shown that, when rent controls are

[2]"A price decrease coupled with a declining output would mark the onset of monopsony." *Id.*

imposed, maintenance of rental housing declines and reinvestment in major building systems declines. *See, e.g.*, 1 I. Lowry, Rental Housing in New York City 3-6 (1970) (Between 1960 and 1968, the dilapidated housing inventory increased by 44 percent, and the deteriorated stock by 37 percent in New York City. In 1968, 29 percent of all rent controlled units were deteriorated, as compared to 8 percent of the uncontrolled stock.); Hirsch, *From "Food for Thought" to "Empirical Evidence" about Consequences of Landlord-Tenant Laws*, 69 Cornell L. Rev. 604, 611 (1984). Because most of the costs of owning rental housing are the fixed costs of mortgage payments and taxes, an owner unable to obtain a market rent typically adjusts his costs by deferring maintenance. *See, e.g.*, Moorhouse, *Optimal Housing Maintenance Under Rent Control*, 29 Southern Econ. J. 93, 104 (1972).

Rent controls predictably and regularly reduce the supply of rental housing not only through loss of existing stock but through deterrence of new construction. Even an ordinance, such as Berkeley's, that exempts newly constructed housing discourages entry and new investment. Investors fear, and reasonably so, that the parochial political forces that enacted rent control will later expand its reach. *See, e.g.*, Hirsch, *supra*, at 609; Kalymon, *Apartment Shortages and Rent Control*, in Rent Control: Myths and Realities 231, 242 (E. Olsen ed. 1981) ("Investors in rental accommodations reduced their level of activity as a response to concerns over future permitted rent increases."); U.S. Dept. of Housing and Urban Development, Housing in the Seventies 161 (1974).

Finally, rent control retards the mobility of the work force by providing the deepest subsidy to long-term tenants regardless of their income levels. *See, e.g.*, Achtenberg, *The Social Utility of Rent Control*, in Housing Urban Amer-

ica 459, 466 (J. Pynoos ed. 1980) ("[R]ent controls place all existing occupants of controlled housing in a privileged position vis-a-vis other competitors for rent controlled space. . . . [O]utsiders may be forced to pay higher rents than they would have in the absence of controls. . . . Or, they may be economically barred from housing. . . ."); Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691, 694 (1983); Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517, 555 (1984) (rent control benefits present tenants at the expense of future tenants); Ault, *The Presumed Advantages and Real Disadvantages of Rent Control*, in Rent Control: Myths and Realities 53, 70 (E. Olsen ed. 1981) ("There are two ways in which rent control is likely to reduce mobility. First, to the extent that it reduces construction of new rental housing and leads to lower vacancy rates, residents will be deterred from moving by the increased difficulty of locating a vacant rental unit. . . . Also, residents of rent controlled units will be further discouraged from moving because in so doing they must forego the subsidy associated with tenure."). Those who would move into or within a rent controlled city may find fewer or no vacancies and may be faced with a requirement to pay black market "fees" to departing tenants. Muth, *supra*, at 696.

These pernicious economic effects that result from fixing rents are precisely those that persuaded this Court to enunciate a *per se* rule. Depending upon local demand and upon the adjustment mechanisms of particular ordinances, these effects may be more or less severe. And they may vary over time, depending upon the degree to which controlled rents are below or above those a free market would establish. But the very purpose of the *per se* rule against price fixing is to avoid "the burden of ascertaining from day to day whether [a

price] has become unreasonable through the mere variation of economic conditions." *United States v. Trenton Potteries Co.*, 273 U.S. at 398, *quoted in Arizona v. Maricopa County Medical Society*, 457 U.S. at 345. Accordingly, an ordinance that mandates the fixing of rents at pegged levels constitutes a *per se* violation of and is preempted by the Sherman Act.

D. The fact that this Court has not previously dealt with rent control does not reduce the propriety of applying the *per se* rule.

This Court has stated, on numerous occasions and in unequivocal terms, that "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Arizona v. Maricopa County Medical Society*, 457 U.S. at 349 (quoting *Socony-Vacuum Oil Co. v. United States*, 310 U.S. at 222). Because rent control is price fixing, "the paradigm of an unreasonable restraint of trade," *NCAA v. Board of Regents of University of Oklahoma*, 104 S. Ct. 2948, 2960 (1984), application of the *per se* rule is justified without inquiry into the special characteristics of the Berkeley housing market. *See Arizona v. Maricopa County Medical Society*, 457 U.S. at 349-51; *National Society of Professional Engineers v. United States*, 435 U.S. at 679.

III. Subjecting Municipalities To Traditional Antitrust Principles Preserves The Structure Of Our Federal System And Enhances Predictability; It Does Not Hinder Performance of Local Government.

The Sherman Act accommodates a local exercise of police power by granting an exemption when sovereign states establish a clearly articulated and affirmatively expressed state policy for such an exemption.

Thus, a state legislature can, if it wishes to do so, permit municipalities to replace traditional federal antitrust analysis with their own criteria. To require this kind of formal "delegation" of state authority is no mere technicality. It preserves the structure of our federal system by maintaining a clear allocation of responsibilities among Congress, the states, and courts (both federal and state). The contrary approach taken below would destroy that allocation and the predictability of the federal antitrust laws.

As this Court recently held in *Arizona v. Maricopa County Medical Society*:

> adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy . . . . By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application . . . we enhance the legislative perogative to amend the law.

457 U.S. at 354.

This Court has instructed non-sovereign entities to raise police power concerns that may involve otherwise impermissible trade restraints to their sovereign states, which speak for a less parochial interest. Thus, Berkeley is free to persuade the sovereign State of California to empower it to fix rents. Until that sovereign state so acts, the Sherman Act's "mandate of competition" has legal supremacy, and the citizens are protected from "the serious economic dislocation that could result if cities were free to place their own parochial interests above the nation's economic goals reflected in the antitrust laws." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412-13 (1978).

If California believes that rent control protection of the type here presented is more important than the benefits of competition, it can so determine, and some states have done so. *See, e.g.*, Conn. Gen Stat. Ann. § 7-148(b)-(f) (West Supp. 1985); Mass. Gen. Laws Ann. ch 842, §§ 1-1 to 1-14 (West Supp. 1985); N.Y. Unconsol. Laws §§ 8601-8610 (McKinney Supp. 1984). Indeed, the California legislature itself has authorized certain restraints of trade that might otherwise be objectionable under the Sherman Act. *See, e.g.*, Cal. Water Code § 31136 (West 1984) ("The district may prescribe, revise, and collect rates or other charges for the [garbage, waste, trash disposal] services furnished pursuant to this article.") In the absence of such an authorization, Congress has preempted all contrary state or local action, and a balancing between the Sherman Act and local concerns is out of place.

In the present case the California Supreme Court has assumed the authority to develop a standard for balancing federal antitrust policy against the self-proclaimed interests of the City of Berkeley. Prior decisions of this Court do not permit this obfuscation of the allocation of powers between the federal government and the sovereign states. Left standing, the decision below would abrogate the rights of state legislatures to grant or withhold antitrust exemption to or from local municipalities.

An injunction, which should properly issue in this case, will not disrupt the proper functions of local government in the City of Berkeley nor deplete its coffers. Last year Congress recognized that the continued application of the antitrust laws would in appropriate cases cause courts to strike down municipal ordinances; nonetheless it refused to modify the substantive antitrust standards applicable to municipalities. Instead Congress enacted the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat.

2750 (codified at 15 U.S.C. §§ 34-36 (1984)) barring actions for damages and the recovery of attorneys fees against municipalities. By such action Congress removed the concern that the application of the antitrust laws would cause municipalities financial hardship or inhibit their decision making.

CONCLUSION

For the foregoing reasons and those set forth by the appellants, the judgment of the California Supreme Court should be reversed.

Dated: August 1, 1985

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, *et al.*,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Sherman Antitrust Act Pre-Empts the Berkeley Rent Control Initiative	5
A. The Ordinance Mandates Anticompetitive Activity Expressly Prohibited by Federal Antitrust Laws	5
B. The Anticompetitive Effect of the Ordinance Frustrates the Procompetitive Objectives of the Sherman Act	8
II. The Berkeley Ordinance Cannot Claim Exemption From the Federal Antitrust Laws	12
A. The Berkeley Ordinance Does Not Satisfy the State Action Test Developed by *Parker* and its Progeny	12
B. The New Standard Fashioned by the California Supreme Court is Inconsistent With the Legal Basis for the *Parker* Exemption	19
C. The California Supreme Court Misapplied its Own Novel Standard	22
CONCLUSION	23

TABLE OF AUTHORITIES

	PAGE
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)	7
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	7, 12, 17
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	12, 20
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	6, 12, 14, 17
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	7
First American Title Company of South Dakota v. South Dakota Land Title Ass'n, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 709 (1984)	6
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1962)	5
Hines v. Davidowitz, 312 U.S. 52 (1941)	5, 12
Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Board, ___ U.S. ___, 104 S.Ct. 2518 (1984)	5
Nash v. Florida Industrial Commission, 389 U.S. 235 (1967)	8
Northern Pacific Ry v. United States, 356 U.S. 1 (1958)	9
Parker v. Brown, 317 U.S. 341 (1943)	4, 12
Rice v. Norman Williams Co., 458 U.S. 654 (1982)	4-7

	PAGE
Southern Motor Carriers Rate Conference, Inc. v. United States, ___ U.S. ___, 105 S.Ct. 1721 (1985)	15, 16, 18
Town of Hallie v. City of Eau Claire, ___ U.S. ___, 105 S.Ct. 1713 (1985)	15, 16
United States v. Socony-Vacuum, 310 U.S. 150 (1940)	7
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	9
Statutes and Constitutional Provisions	
U.S. CONST. art. VI, cl.2	5
15 U.S.C. § 1 (1976)	6
§ 35	18
Cal. Govt. Code § 65300	21
§ 65302	21
§ 65583	14, 16, 21
§ 65589	16
Wisconsin Stat. § 62.18	15
Wisconsin Stat. Ann. § 66.069(2)(c) (Supp. 1984)	15
Other	
Baird, RENT CONTROL: THE PERENNIAL FOLLY (1980)	10, 22
Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze*, 10 Hastings Const. L. Q. 255 (1983)	9

PAGE

Friedman and Stigler, *Roofs or Ceilings? The Current Housing Problem,* in (RENT CONTROL: A POPULAR PARADOX) 93 (1975) 9-11

Hayek, *The Repercussions of Rent Restrictions,* in (RENT CONTROL: A POPULAR PARADOX) 75 (1975)..... 11

Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L. J. 691 (1983) 9

Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences,* 69 Cornell L. Rev. 517 (1984)..... 10

Sternleib and Hughes, *Rent Control's Impact on the Community Tax Base* in (AMERICA'S HOUSING: PROSPECTS AND PROBLEMS) 267 (1980)..... 11

H. R. Rep. No. 965, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 4602..... 18, 19

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BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANTS

This brief *amicus curiae* in support of appellants is submitted with the written consents of counsel to all parties filed with the Clerk of the Court.

INTEREST OF AMICUS

Mid-America Legal Foundation has an interest in the disposition of this case which is before this Court on appeal from the Supreme Court of California. The Foundation was organized to support the public interest in preserving the economic and political freedoms of our democratic society. Mid-America seeks to present a broad perspective on the important antitrust principles at stake in this case, based upon

the Foundation's longstanding concern with the relationship between government and the free enterprise system.

The California Supreme Court has carved an exception to the Sherman Act which has the potential of cloaking a wide range of municipal regulatory activity with antitrust immunity. According to the test created by the court below, once a municipality determines that a public welfare need exists, it may proceed with near impunity to control competition in the relevant market, notwithstanding the federal antitrust laws. Widespread application of such an exception to regulate commercial activity could cripple the competitive enterprise system.

SUMMARY OF ARGUMENT

The court below created a new rule of law which places municipal price-fixing activity beyond the reach of the federal antitrust system. This "municipal welfare" exemption conflicts with the century-old consensus, embodied in Congressional statutes and in the precedents of this Court, that only sovereign governments may authorize departure from the standard of free competition.

The Berkeley rent control ordinance violates the Supremacy Clause of the United States Constitution on two separate grounds. According to established principles developed by this Court, the measure is pre-empted by the Sherman Act, because it mandates price-fixing conduct which is in all cases a *per se* violation of the Act. In addition, the scheme at issue frustrates the procompetitive purposes of the federal antitrust legislation, because it stifles competition among present and potential providers of housing services in the Berkeley rental market.

The Berkeley initiative cannot claim exemption from the federal antitrust laws as state action. The state action doctrine, as developed by *Parker* and its progeny, extends antitrust immunity to municipalities only where the local government acts pursuant to a "clearly articulated and affirmatively expressed" state policy. California statutes neither clearly articulate a state policy in favor of rent control nor affirmatively grant to municipalities the power to enact rent control. Therefore, the anticompetitive Berkeley rent control scheme cannot shield itself from antitrust scrutiny under the guise of state action.

In addition, the California Supreme Court ignored established law and fashioned a new standard by which to evaluate the anticompetitive activities of municipalities. The court, moreover, misapplied its own test when it sustained an overly broad rent control plan that fails to qualify as the "least intrusive means" of achieving articulated housing goals.

ARGUMENT

In examining the Berkeley rent control ordinance at issue in this case, the California Supreme Court concluded that "if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with section 1 or 2 of the Sherman Act unless the plaintiff demonstrates that the city's purpose could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies." *Fisher v. City of Berkeley,* Juris. Stmt. App. 1,2. The court admitted that its test represented unprecedented "wander[ing] off the map and travel[ing] cross country", but it is not true that this wandering occurred "without the benefit of trail or compass." Juris. Stmt. App. at 15. The state court had available to it a reasonably well-defined body of principles developed by this Court, but it failed to apply them properly.

The confusion below stemmed from a neglect to keep separate the analytically distinct domains of federal legislative pre-emption, Sherman Act violation doctrine, and the state action antitrust immunity of *Parker v. Brown,* 317 U.S. 341 (1943) and its progeny. The opinion of the California Supreme Court reads like a jurisprudential goulash, blending together heretofore discrete ingredients to produce an exotic new dish, the "municipal welfare" exemption from federal antitrust scrutiny. This novel outcome results from a muddled analysis at odds with the functional two-step approach employed by this Court in *Rice v. Norman Williams Co.,* 458 U.S. 654 (1982). In light of *Rice,* the proper inquiry has nothing to do with the obfuscating evaluation of local purposes and powers engaged in by the court below. Rather, the validity of anticompetitive regulation is determined by asking two straightforward and familiar questions. First, is the regulation foreclosed by federal antitrust law according to traditional pre-emption principles? 458 U.S. at 659. Second, if pre-emption is prescribed, is the

measure immunized from invalidation by the *Parker* state action doctrine? *Id.* at 662-63 n.9. The answers to these questions, inopportunely tangled by the California Supreme Court, mandate overturning the Berkeley ordinance.

I. THE SHERMAN ANTITRUST ACT PRE-EMPTS THE BERKELEY RENT CONTROL INITIATIVE.

A. The Ordinance Mandates Anticompetitive Activity Expressly Prohibited by Federal Antitrust Laws.

The doctrine of federal legislative pre-emption is based on the Supremacy Clause, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, Any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Federal law voids or "pre-empts" local (state, county, municipal, etc.) law to the extent that the latter "actually conflicts" with national law. *Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board,* ____ U.S. ____, 104 S.Ct. 2518, 2523 (1984). Such a conflict arises when compliance with both local and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963), or when the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

In the present case, the Berkeley initiative cannot pass muster under the "actual conflict" pre-emption test. As the California Supreme Court recognized below, the Berkeley ordinance mandates "price-fixing". Juris. Stmt. App. at 2. The tension between the purposes, language, operation, and necessary effect of the rent control scheme at issue and the Sherman

Act[1] simply cannot be reconciled. Therefore, as one federal circuit recently concluded, "[a]bsent the state action doctrine, the Sherman Act preempts the conflicting [city] regulation." *First American Title Company of South Dakota v. South Dakota Land Title Association,* 714 F.2d 1439, 1451 (8th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 709 (1984).

A seven member majority of this Court agreed in *Rice v. Norman Williams Co.,* 458 U.S. 654 (1982), upon an analytical framework for determining when a facial challenge to a state statute will be sustained on Sherman Act pre-emption grounds. *A municipal ordinance* like the Berkeley measure, which enjoys little if any independent antitrust protection, *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982), is *a fortiori* subject to the *Rice* regime. In *Rice,* this Court upheld a California statute prohibiting state-licensed alcoholic beverage importers from purchasing any brand of distilled spirits unless they were designated as an authorized importer by the brand owner. The statute was found to be facially reconcilable with the Sherman Act because it authorized a vertical nonprice restraint which, according to traditional antitrust analysis, may or may not involve undue anticompetitive consequences depending upon specific applications of the statutory designation power. The opinion generalized, however, that

> [a] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct

[1] Section 1 of the Sherman Antitrust Act of 1890 provides in pertinent part that "[e]very . . . combination . . . in restraint of trade among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (1976).

> contemplated by the statute is in all cases a *per se* violation.[2]

458 U.S. at 661.

Nothing in antitrust jurisprudence is more settled than the doctrine that price-fixing constitutes such a *per se* violation of the Sherman Act. *See, Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 407-09 (1911); *United States v. Socony-Vacuum,* 310 U.S. 150, 223 (1940); *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 342-57 (1982). Significantly, this Court has applied *per se* violation analysis unanimously to strike down a price maintenance requirement embodied in state statute. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980). In *Midcal,* the Court examined a statute that required members of the California wine industry to file fair trade contracts or price schedules with the state, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers must post a resale price schedule for that producer's brands. The statute was held to facially conflict with the Sherman Act because it mandated resale price maintenance. 445 U.S. at 102-103. As the Court pointed out two years later in *Rice, Midcal*-type price maintenance is "an activity that has long been regarded as a *per se* violation of the Sherman Act." 458 U.S. at 659-60.

The *Midcal* price maintenance program held to conflict with the Sherman Act is substantially indistinguishable in effect

[2] As the Court earlier explained, *id.* at 659-60 n.5, "[u]nder established antitrust principles, *per se* rules of illegality are appropriate only when they apply to practices 'which because of their pernicious effect on competition and lack of redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 50 (1977), *quoting Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5 (1958)."

from the Berkeley rent control scheme at issue. Both the voided state statute voided in *Midcal* and the municipal ordinance here at issue combine private economic actors into a cartel of generic "suppliers" forced to maintain fixed charges for provision of their property and services. In light of *Midcal* and *Rice* such price-fixing activity amounts to a *per se* violation which cannot be reconciled with the paramount federal antitrust statute.

B. The Anticompetitive Effect of the Ordinance Frustrates the Procompetitive Objectives of the Sherman Act.

In addition to the strong implication in *Rice* that local government actior which mandates a *per se* Sherman Act violation is *ipso facto* pre-empted by federal law, it is clear that the anticompetitive ordinance at issue conflicts with the staunchly procompetitive policy of the national antitrust regime. The Sherman Act pre-empts the Berkeley regulation because the latter serves to " 'retard, impede, burden . . . or control the operation of . . .,' [or] 'frustrates the purpose of . . .,' [or stands] 'as an obstacle to the accomplishment and execution of' " the Sherman Act's national objectives. *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), *quoting respectively McCulloch v. Maryland,* 17 U.S. 316, 436 (1819); *Davis v. Elmira Savings Bank,* 161 U.S. 275, 283 (1896); *Hill v. Florida,* 325 U.S. 538, 542 (1945). The *raison dètre* of the Sherman Act—indeed, of our entire complicated antitrust system—is competition. As the late Justice Black noted,

> [t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained inter-action of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958). In a similar vein, Justice Marshall, speaking for the Court in *United States v. Topco Associates, Inc.,* 405 U.S. 596 at 610 (1972), has affirmed that

> [a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Such rhetoric carries with it implicit recognition of the "quasi-constitutional character of the national antitrust laws." Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze,* 10 Hastings Const. L. Q. 255, 261 (1983). In light of this fundamental character it is apparent that any state or local law which requires departure from the overwhelmingly clear Sherman Act mandate for free competition carries a heavy burden of justification. Local rent control in general, and the *Berkeley* ordinance in particular, cannot carry that burden, because such measures inevitably stifle competition for housing services.

Rent control is replete with anticompetitive consequences that affect the housing market. The most immediate effect occurs through the fundamental principles of supply and demand: an artificially low price for housing services causes an increase in the quantity of such services demanded. Since the housing stock remains relatively constant in the short run, this increased quantity demanded manifests itself as a housing shortage. Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L. J. 691, 694 (1983). As Professors Milton Friedman and George Stigler have flatly stated, "the legal ceilings on rents are the reason why there are so few places for rent." *Roofs or Ceilings? The Current Housing*

Problem, in RENT CONTROL: A POPULAR PARADOX 93 (1975) (hereinafter cited as Friedman and Stigler). Rent control has frequently been touted as a cure rather than a cause for housing shortage, but such reasoning inevitably leads to a circular argument in favor of rent control:

> [a]s long as the shortage created by rent ceilings remains, there will be a clamor for continued rent controls. This is perhaps the strongest indictment of ceilings on rents. They, and the accompanying shortage of dwellings to rent, perpetuate themselves, and the progeny are even less attractive than the parents.

Friedman and Stigler at 100.

The shortage of units under rent control results in arbitrary allocation of housing services. Rent control favors current tenants at the expense of prospective tenants, including the young and newcomers, both important segments of the Berkeley community due to the presence of the University of California. Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences,* 69 Cornell L. Rev. 517, 555 (1984). Competition among these prospective tenants for the short supply of housing shifts from the price arena to such criteria as race, social status, presence of children, and sheer doggedness in the search for an apartment. In the traditional economic sense, tenant competition for rental housing is drastically curtailed.

Further, over the long run, rent control results in the deterioration of rental housing through the lack of maintenance and new improvements. No matter at what level rent is fixed, the landlord will attempt to extract profit from his or her investment by cutting expenses to the detriment of the property. Baird, RENT CONTROL: THE PERENNIAL FOLLY 64 (1980) (hereinafter cited as Baird). Landlords thus face strong disincentives to compete in making their buildings attractive.

Perhaps the most serious long term effect of rent control is that it discourages new construction of rental housing. According to Professors Friedman and Stigler, "[r]ent ceilings do nothing to alleviate this shortage. Indeed, they are far more likely to perpetuate it: the implications of the rent ceilings for new construction are ominous." Friedman and Stigler at 99. The Berkeley ordinance attempts to avoid this pitfall by exempting new construction from rent control. Juris. Stmt. App. 115. This promise of a market return on new construction, however, is illusory. Since new buildings may become subject to rent controls sometime in the future, investors require an even higher profit percentage before they will underwrite rental housing. This tends to stifle construction which might otherwise occur.

In addition to the foregoing, rent control fosters a variety of other consequences that tend to reduce competitive efficiency. For example, rent control can increase taxes on all municipal properties because it diminishes rental housing property values. *See* Sternlieb and Hughes, *Rent Control's Impact on the Community Tax Base,* in AMERICA'S HOUSING: PROSPECTS AND PROBLEMS 267 (1980). Likewise, rent control discourages the efficient use of labor because it decreases the mobility of workers, who are unable to find shelter in the shortage environment fostered by the controls. Hayek, *The Repercussions of Rent Restrictions,* in RENT CONTROL: A POPULAR PARADOX 74 (1975). Workers tend to stay unemployed longer than would otherwise be the case if their geographical horizons are limited.

To conclude, the Berkeley ordinance effectively cripples price competition, the central nervous system of any free market. It is therefore impossible to view the present rent control measure as anything but an obstacle to the accomplishment and execution of the full procompetitive purposes

and objectives embodied in the Sherman Act. *Hines v. Davidowitz,* 312 U.S. at 67. According to established pre-emption doctrine, then, the Supremacy Clause of the United States Constitution requires that the Berkeley ordinance be invalidated.

II. The Berkeley Ordinance Cannot Claim Exemption From the Federal Antitrust Laws.

A. The Berkeley Ordinance Does Not Satisfy the State Action Test Developed by *Parker* and its Progeny.

This Court established the state action exemption from federal antitrust scrutiny by declining to apply the Sherman Act to the anticompetitive conduct of a state acting through its legislature. *Parker v. Brown,* 317 U.S. 341, 350-351 (1943). *Parker* emphasized principles of federalism and state sovereignty, holding that the Sherman Act was intended to prohibit private restraints on trade and not to "nullify a state's control" in activities directed by the legislature. 317 U.S. at 351.

Municipalities, on the other hand, are not beyond the reach of the federal antitrust laws, because they are not themselves sovereign. *City of Lafayette v. Louisiana Power and Light Co.,* 435 U.S. 389, 412 (1978) (opinion of Brennan, J.). To obtain exemption, municipalities must demonstrate that their anticompetitive activities are authorized by the state "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. *Lafayette* attempted to set guidelines to determine when a municipality is acting "pursuant to state policy". The Court warned, however, that "the state may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful." *Id.* at 414, *citing Parker,* 317 U.S. at 351.

In essence, *Lafayette* suggested that a municipality can obtain state action immunity only by showing that it acted pursuant to a "clearly articulated and affirmatively expressed . . . state policy" that is "actively supervised" by the State. *Id.* at 410. This test was subsequently articulated and adopted by a majority of this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).

The two-pronged *Lafayette* test was first applied to the anticompetitive activities of a municipality in *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982). *Boulder* involved a dispute between the city of Boulder, Colorado, and the assignee of a permit to conduct a cable television business within the city. The cable company charged that the city council's moratorium ordinance, which intended to encourage entry of new businesses into the market, violated section 1 of the Sherman Act. The city claimed exemption from antitrust liability, because the Colorado legislature had granted municipalities general "home rule" powers.

Boulder held that a "home rule" municipality that is granted extensive powers of self-government in local and municipal matters by the state constitution is not exempt from the Sherman Act under the state action doctrine. 455 U.S. at 56. The Colorado legislature's "guarantee of local autonomy" was not a "clear articulation and affirmative expression" of a state policy authorizing anticompetitive activity. *Id.* This Court stated that the home rule provision of the state constitution merely expresses Colorado's neutrality toward Boulder's anticompetitive activity:

> A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as 'comprehended within the powers *granted,*' since the term, 'granted', necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The

> relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged, '[W]e are here concerned with city action in the absence of any regulation whatever by the State of Colorado. Under these circumstances, there is no interaction of State and local regulation. We have only the action or exercise of authority by the City.'

Id. at 55 (emphasis by the Court). *Boulder* stands for the principle that any state government action is not *ipso facto* exempt from the Sherman Act under the *Parker* doctrine. To be immunized from antitrust liability, any subordinate state entity must act pursuant to a "clearly articulated and affirmatively expressed" state legislative policy which is specific enough to show that the legislature not only contemplated the anticompetitive actions, but that it granted the municipality the authority to engage in such conduct.

In the present case, there is neither a specific grant of authority, nor a clearly articulated or affirmatively expressed state policy which immunizes Berkeley's rent control ordinance from the Sherman Act. The California Legislature does grant its municipalities the broad authority to preserve, improve and develop housing. Cal. Govt. Code § 65583.[3] However, this grant of authority is very similar to the "home rule" grant in *Boulder* which this Court found insufficient to satisfy the "clear articulation and affirmative expression" standard.

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[3] Cal. Govt. Code § 65583 describes what the objectives of a municipality's housing plan are to be and in pertinent part reads: "[t]he housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives and scheduled programs for the preservation, improvement and development of housing. The housing element shall identify adequate sites for housing, . . . and shall make adequate provision for existing and projected needs of all economic segments of the community.

Recent cases concerning the application of the state action exemption to municipalities delineate further what state activity satisfies the "clear articulation and affirmative expression" test. In *Town of Hallie v. City of Eau Claire,* ____ U.S. ____, 105 S.Ct. 1713 (1985), and *Southern Motor Carriers Rate Conference, Inc. v. United States,* ____ U.S. ____, 105 S.Ct. 1721 (1985), this Court refined the guidelines which govern how clearly a state policy must be articulated in order for a municipality to establish that its anticompetitive activity constitutes state action. In *Hallie,* unincorporated townships adjacent to Eau Claire alleged that the city had violated the Sherman Act by tying the provision of sewage treatment, in which it enjoyed an area-wide monopoly, to the provision of sewage collection and transportation services, in which the townships wished to compete with the city. Eau Claire refused to treat the townships' sewage, but did extend treatment services to individual township residents if they voted to have their homes annexed by Eau Claire and agreed to use the city's collection and transportation services.

This Court held that the municipality's anticompetitive activities were protected by the state action exemption to the federal antitrust laws, and cited several Wisconsin statutes which *specifically grant* to cities the power to restrict unannexed territories' access to city sewage services. 105 S.Ct. at 1718. The Wisconsin legislation involved in *Hallie* grants authority to cities to construct, add to, alter and repair sewage systems, and to "describe with reasonable particularity the district to be [served]." Wisconsin Stat. § 62.18(1) (1982). Furthermore, Wis. Stat. Ann. § 66.069(2)(c) (Supp. 1984) (emphasis supplied), provides that a city operating a public utility.

> . . . may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the *municipal utility shall have no obligation to serve beyond the area so delineated.*

The *Hallie* Court concluded that the clear articulation requirement of the state action test was satisfied since the statutory provisions plainly show that "the legislature contemplated the kind of action complained of." *Town of Hallie,* 105 S.Ct. at 1719, *quoting Lafayette,* 435 U.S. at 415. In short, the *Parker* doctrine placed Eau Claire beyond the reach of federal antitrust law because the Wisconsin legislature specifically granted municipalities the authority to engage in precisely the conduct which formed the basis of the townships' complaint.

In a case decided the same day as *Town of Hallie,* a motor carriers' rate conference's anticompetitive activities were held immune from federal antitrust liability, on the ground that the private ratemaking involved was conducted pursuant to "clearly articulated state policy" in the four states involved. *Southern Motor Carriers Rate Conference, Inc. v. United States,* 105 S.Ct. 1721. This Court found a "clear articulation" of policy because three of the states had statutes expressly permitting collective ratemaking, and the fourth had clearly articulated its intent to displace price competition among common carriers with a regulatory structure. 105 S.Ct. at 1731-32. Again, as in *Town of Hallie,* the anticompetitive conduct was protected by the state action exemption only because the legislatures' intent to do so was expressly stated. *Id.*

In the case at bar, California law is considerably less specific than the Wisconsin statutes construed in *Town of Hallie.* The latter expressly authorize the precise municipal action challenged under the antitrust laws, whereas the California statutes only require municipalities to develop a housing plan without specifying what actions the municipality can take to control and develop housing. Cal. Govt. Code § 65583.

Furthermore, it can hardly be said that the state legislature contemplated Berkeley's use of extensive rent controls to further state housing policy. In its only specific mention of "rent control" in the California statutes, the state legislature takes a position of mere neutrality. Cal. Govt. Code § 65589(b) states:

> [n]othing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

This type of legislative indifference was addressed by this Court in *Boulder* when it stated that

> the requirement of 'clear articulation and affirmative expression is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A state that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as 'comprehended with the powers *granted,*' since the term 'granted' necessarily implies an affirmative addressing of the subject by the State. . . .

455 U.S. at 55 (emphasis by the Court, footnote omitted).

The California statutes merely allow municipalities to "do as they please" to further state housing policy, and expressly take a "neither here nor there" stance on rent control. "Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that [the] precedents require." *Boulder,* 455 U.S. at 56. Thus, since the state of California has not clearly articulated a state rent control policy nor affirmatively expressed a grant of authority to municipalities to enact rent controls, the Berkeley ordinance fails to satisfy the first prong of this Court's state action test.

The Berkeley ordinance proves inadequate under the second prong of this test as well. The standard requires that the anticompetitive conduct of subordinate entities be "actively supervised by the state" to ensure immunity from federal antitrust laws. *Midcal,* 445 U.S. at 97. "Where a state or

municipal regulation of a private party is involved, . . . active state supervision must be shown, even where a clearly articulated state policy exists." *Town of Hallie,* 105 S.Ct. at 1720 n.10, *citing Southern Motor Carriers,* 105 S.Ct. at 1731.

In the present case, private parties are regulated by the municipality, and the record reveals no state supervision of this regulation. The Berkeley Rent Stabilization Board does not act as an arm of the state and apparently does not report to any state agency. In effect, the city of Berkeley is administering a price fixing scheme on its own without any state involvement. Thus, the failure of the ordinance to meet the second requirement for immunity is self-evident.

It should be noted that Congress has reaffirmed the state action doctrine outlined above as the yardstick by which to measure municipal immunity from the federal antitrust laws. Congress considered this issue during its enactment of the Local Government Antitrust Act of 1984, and concluded that

> H.R. 6027 [which became the Local Government Antitrust Act of 1984, 15 U.S.C. § 35, Public Law 98-544] would in no way limit the antitrust immunity for States that the courts have recognized in *Parker v. Brown,* 317 U.S. 341 (1943), and subsequent decisions interpreting the 'state action' doctrine. The bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law. For example, *there will be no change in the substantive antitrust law applicable to local governments* . . . .

H.R. Rep. No. 965, 98th Cong., 2d Sess. 2-3, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4602, 4603 (emphasis supplied).

During hearings on this issue, the House Judiciary Committee examined a number of witnesses, including state and local officials, Justice Department antitrust lawyers, and other interested persons, who argued for and against adoption of several alternative bills that would have explicitly extended *Parker* immunity to local governmental units in certain enumerated circumstances. The House Report states: "[a]lthough the Committee received testimony favoring broader immunity for local governments, it chose at this time to address only the issue of antitrust damage suits." *Id.* at 2, 4602. Therefore, having formally considered the question of immunity from federal scrutiny, Congress has acquiesced in the judicial application and development of current legal doctrine defining the scope of potential municipal antitrust liability.

In conclusion, Berkeley's rent control ordinance is not exempt from federal antitrust laws under the state action doctrine. The California legislature has neither "clearly articulated" nor "affirmatively expressed" a state policy in favor of rent control. Furthermore, the Berkeley rent control ordinance is enforced without any state supervision. Therefore, in accord with this Court's decisions in *Lafayette, Boulder* and *Town of Hallie,* and Congress' acquiescence in the judicial application of the state action doctrine, Berkeley cannot claim immunity from the antitrust laws.

B. The New Standard Fashioned by the California Supreme Court is Inconsistent with the Legal Basis for the *Parker* Exemption.

Because the California Supreme Court claimed that "this case forces us to wander off the map and travel cross country without the benefit of a trail or compass," Juris. Stmt. App. 15, it adopted an unprecedented standard by which to evaluate the applicability of the federal antitrust laws to municipal action. This standard articulated below departs from the well-defined

principles developed by this Court. The California court concluded that

> if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the City's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.

Juris. Stmt. App. 31. By ignoring this Court's requirement that only "clearly articulated and affirmatively expressed" state policy may exempt municipal action from federal antitrust scrutiny, the California court granted municipalities unwarranted freedom to initiate anticompetitive conduct. This grant of power to municipalities to violate the Sherman Act regardless of the presence or absence of clearly articulated state policy directly contradicts this Court's rationale in extending the *Parker* exemption to municipalities in the first place. *See, City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). The law extends antitrust immunity to a municipality only when it acts directly as an arm of the sovereign state. The California court's standard, however, would extend immunity to any city exercising its police power. As Justice Lucas correctly realized in his dissent below,

> [t]o allow a local government entity to excuse a price fixing scheme on the basis of asserted public health, safety or welfare considerations would enmesh the court in an impossible task of weighing the 'apples' of social welfare with the 'oranges' of antitrust policy.

Juris. Stmt. App. 85.

Despite the California court's language to the contrary, the Berkeley rent control ordinance fails to meet the objectives of articulated state policy. Berkeley correctly points out that California statutes mandate that localities include a "housing

element" in their "general [development] plan". Cal. Govt. Code § 65300, 65302(i). Specifically, California requires that

> [t]he housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives and scheduled programs for the preservation, *improvement and development* of housing. The housing element shall identify adequate sites for housing, . . . and shall make adequate provision for existing and projected needs of *all economic segments* of the community.

Cal. Govt. Code § 65583 (emphasis supplied).

The Berkeley ordinance fails to adhere to this state policy on two grounds. First, the state policy calls for improvement and development of housing. An across the board rent control ordinance with a severely limited review process can only stifle such improvement and development. Rent control in essence freezes a landlord's potential return on his or her investment and severely discourages future investment in aesthetic amenities or building security. Further, rent control becomes an unreasonable restraint on alienation of leased property. Few potential buyers can be attracted to purchase or develop rental property where the return on their investment is frozen at 1980 levels.

Second, the state policy specifies that the locality's housing element must accommodate the needs of all economic segments of the community. Although some limited forms of rent control may prove desirable to preserve lower income housing, a blanket rent control ordinance has detrimental effects on middle and upper income housing. The owner of these types of units can only preserve his or her profits against inflation by limiting or removing building amenities such as recreational facilities and security systems. These common features will be denied to tenants who desire them because of the landlords' limited ability to collect a rent which reflects their costs. Thus, an across the board rent control ordinance like the Berkeley initiative fails to meet the needs of all economic segments of the community as mandated by the California legislature.

C. The California Supreme Court Misapplied its Own Novel Standard.

The Berkeley ordinance even fails to meet the new test created by the California Supreme Court to evaluate the initiative's compatability with the federal antitrust laws. That standard extends antitrust immunity to a municipality exercising its police power "unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by *means that would have a less intrusive impact on federal antitrust policies.*" Juris. Stmt. App. 31 (emphasis supplied). The California court upheld the ordinance in part because "plaintiffs suggest no alternative, equally effective approach. . . ." *Id.* at 33. This rationale suggests that the court expected plaintiffs to meet an as yet unannounced standard.

Dissenting Justice Lucas and various commentators have pointed out several alternatives to rent control which would achieve Berkeley's purposes while intruding less upon the federal antitrust domain. The key to minimizing the intrusion on procompetitive policies lies in maintaining the free market price of rental housing to the greatest possible extent. For example, Justice Lucas proposed public housing projects and the use of municipally-acquired properties. Juris. Stmt. App. 86. These plans could affect rents, but only in certain buildings and not in the community at large. One economist suggests a system of rent subsidies whereby the poor may buy government vouchers to pay for their housing. Baird at 88. This proposal would help the poor without distorting rents at all. In short, any scheme which spreads the financial burden of a housing program to all the taxpayers and not just to landlords would intrude far less upon the free market system than the Berkeley program at issue.

CONCLUSION

For the reasons set forth above, the judgment of the California Supreme Court should be reversed and the Berkeley ordinance declared void.

Respectfully submitted,

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No. 84-1538

IN THE

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OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

v.

CITY OF BERKELEY, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF AMICUS CURIAE OF THE CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF APPELLANTS

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TOPICAL INDEX

	Page
INTEREST OF AMICUS CURIAE	1
INTRODUCTION	2
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. THE POLICIES AND OBJECTIVES OF THE SHERMAN ACT ARE IN CONFLICT WITH BERKELEY'S PRICE-FIXING SCHEME	9
A. FREEDOM FROM PRICE MANIPULATION IS THE VERY HEART OF SHERMAN ACT ECONOMIC POLICY	9
B. THE FEDERALIST POLICY OF THE ANTITRUST LAWS DOES NOT EXCUSE BERKELEY'S SCHEMES	17
II. BERKELEY IS NOT ENGAGED IN "STATE ACTION"	25
CONCLUSION	26

TABLE OF AUTHORITIES

CASES:	PAGE
Agins v. *City of Tiburon*, 24 Cal.3d 266 (1970)	5
Albrecht v. *The Herald Co.*, 390 U.S. 145 (1968)	10, 11
Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982)	11, 12, 13, 14
Becker v. *IRM Corp.*, 38 Cal.3d 454 (1985)	4
Birkenfeld v. *City of Berkeley*, 17 Cal.3d 129 (1976)	4
California Retail Liquor Dealers' Assn. v. *Midcal Aluminum*, 455 U.S. 97 (1980)	17
Chambers v. *Mississippi*, 410 U.S. 284 (1973)	26
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978)	*passim*
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982)	9, 21, 22, 25
Fisher v. *City of Berkeley*, 37 Cal.3d 644 (1984)	*passim*
Garcia v. *San Antonio Metro. Transit. Auth.*, 105 S.Ct 1005 (1985)	22, 23
Goldfarb v. *Virginia State Bar*, 421 U.S. 733 (1975)	10
Hines v. *Davidowitz*, 312 U.S. 52 (1941)	17
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977)	17
Kiefer-Stewart Co. v. *Joseph E. Seagram and Sons*, 340 U.S. 145 (1968)	11
Lincoln County v. *Luning*, 133 U.S. 529 (1890)	21
Nash v. *City of Santa Monica*, 37 Cal.3d 97 (1984)	4
Nash v. *Florida Industrial Comm.*, 389 U.S. 235 (1967)	17
National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978)	12, 13, 23
Parker v. *Brown*, 317 U.S. 341 (1943)	*passim*
Perma Life Mufflers, Inc., v. *International Parts Corp.*, 392 U.S. 134 (1968)	10
Russell v. *United States*, 53 U.S.L.W. 4652, 84-435, (June 3, 1985)	7
San Diego Gas & Electric Co. v. *San Diego*, 450 U.S. 621 (1981)	5

CASES:	PAGE
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951)	11
Simpson v. *Union Oil Corp.*, 377 U.S. 13 (1964)	11
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United States v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944)	10
United States v. *Container Corp.*, 393 U.S. 333 (1969)	10, 16
United States v. *McKesson & Robbins*, 351 U.S. 305 (1956)	11
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)	10, 11, 14
United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972)	13

CONSTITUTIONS, STATUTES AND BILLS:	
United States Constitution, Art. VI, cl. 2	27
15 U.S.C. section 1 et seq.	*passim*
Berkeley Charter Amendment "N," November 2, 1982, Section 121(3)	15
Berkeley Ordinance No. 5261-N.S.	*passim*
Berkeley Ordinance No. 5626-N.S.	4
Berkeley Ordinance No. 5627-N.S.	4
Local Government Antitrust Act of 1984, P.L. 98-544	22, 23
Rule 36.2, Rules of Court	1

PAGE

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BRIEF AMICUS CURIAE OF THE CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.2, the California Apartment Association respectfully submits this brief amicus curiae in support of plaintiffs and appellants, Alexandra Fisher, et al. Written consent to the filing of this brief has been granted by counsel for all parties and lodged with the Clerk of this Court.

Amicus curiae California Apartment Association is a nonprofit association which represents the interests of the more than 352,000 owners of residential rental property in California.

These owners, a majority of whom have their savings invested in modest holdings of four units or less, provide shelter for over 4 million households in the State of California. Many of these owners have seen in recent years the imposition without state sanction of severe local rent controls which have devastated their investment-backed expectations of both profitability and marketability. As a result, the expansion of this industry—and of the housing supply and other industries related thereto—has been virtually frozen in rent-controlled California cities. Growth has also been substantially impaired in uncontrolled areas due to the reasonable fears of investors that increasing numbers of politicians will discover that the cheapest way to subsidize housing costs and thereby curry the favor of renter constituents is to abandon the free market in favor of price regulation.

The California Apartment Association has played a principal role below in the presentation of the antitrust challenge now before this Court, and appears herein to urge the Court to declare Berkeley's ordinance preempted by federal law.

INTRODUCTION

Rental property owners in the City of Berkeley are trapped in a legal and financial straightjacket retroactively imposed upon them by regulatory fiat. This is the precise result sought by the principal architects of the Berkeley rent control movement, the Community Ownership Organizing Project, as declared in their Manifesto:

> By enacting rent control and thereby restricting increases in future rents, a city may actually reduce the present value of a property. This is essentially community expropriation in favor of tenants . . . . Stringent rent control in Berkeley's speculative real estate market would greatly cut the value of rental property. Since other private owners would be unlikely to buy the property in such an unfavorable climate, the city could purchase the property at below market prices or aid tenants in converting the property to cooperative ownership. [*The Cities' Wealth: Programs for Community Economic Control in Berkeley, California* (Institute for Policy Studies, Washington, D.C., 1976), at 21.]

This tendency to abuse majoritarian power to divest private landowners is familiar enough, although some of Berkeley's actions are extreme even by modern standards. Indeed, it is significant that landowners have been singled our for profit deprivation when the prices of food, clothing, and other necessities continue to rise uncontrolled, amid unproven and indefensible assertions of unconscionable profit-taking by landowners. This is nothing new. The risk that the unlanded majority would abuse its political power to take unto themselves the property of the minority for essentially private purposes disguised as an alleged public good was acknowledged by our Founding Fathers.[1]

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[1] Wherever the real power in Government lies, there is the danger of oppression. In our Government the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. [Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 5 *The Writings of James Madison* at 272.]

Complaints are every where heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, *not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority* . . .

[Factions develop whereby] a number of citizens, whether amounting to a majority or minority of the whole, . . . are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

• • •

[T]he most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interest in society . . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the pricnipal task of modern legislation . . .

• • •

When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens . . .

• • •

[In a pure democracy a] common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. . . . [The Federalist No. 10, at 104-109 (J. Madison) (Hamilton ed. 1868) (emphasis added).

The risk of "tyranny of the majority" is inherent in any democracy but becomes particularly acute when elevated from mob sentiment to local governmental policy. Berkeley is not interested in the cooperative partnership of federalism, but rather has evinced an approach to state and federal policy inputs that is perhaps best described as secessionist. In its efforts to control, dominate, and ultimately confiscate private rental properties, it has not evidenced an interest in reconciling its own objectives with national economic policy or the "supply-side" approach to housing taken by its national and state governments, but rather claims a quasi-sovereignty that immunizes it from any obligation to cooperate in a federalist relationship wherein true sovereignty prevails over local parochialism. The California court below acknowledged the plain reality of the matter: "California has no rent control statute." Opinion below, 37 Cal.3d at 655, Appendix A to Jurisdictional Statement ("Appendix") at A-6, quoting from *Birkenfeld* v. *City of Berkeley,* 17 Cal.3d 129, 141 (1976). By no stretch of the imagination are Berkeley's exploits part of any expressly and consciously adopted state policy to abolish market freedom in rental properties in favor of local rent and price controls. Rather, those exploits are an extreme example of the narrow "parochial interests" to which this Court and the Congress have repeatedly declined to subjugate the national procompetitive policy embodied in the Sherman Act, 15 U.S.C. section 1 et seq.

The California Supreme Court has offered no shelter for besieged landowners. In *Nash* v. *City of Santa Monica,* 37 Cal.3d 97 (1984), that court held that the city could prevent an owner from implementing his business decision to completely withdraw from rental property ownership. Although Berkeley denies that its schemes deter market entry, it has similarly enacted such ordinances to stem the flight of beleaguered owners from the market. Berkeley Ordinances Nos. 5626-N.S. and 5627 N.S. In *Becker* v. *IRM Corp.,* 38 Cal.3d 454, (1985), that court ruled that, unlike any other lessor of a product that reached him in a used condition, a lessor who had purchased existing real property is strictly liable in tort, in the absence of any culpable negligence, for preexisting latent defects which cause injury. The California court, of course, is

the author of *Agins* v. *City of Tiburon,* 24 Cal.3d 266 (1979), and *San Diego Gas & Electric Co.* v. *San Diego,* 450 U.S. 621 (1981), holding that even if one can prove that an oppressive regulation deprives all beneficial use of property, the sole remedy for this "taking" is injunction, excluding "just compensation" for the millions of dollars confiscated *pendente lite.* And now, in the instant action, the California court has held that national economic policy favoring independent competitive pricing may be shunted aside by municipal policy which meets its novel federal test subject only to a "less restrictive means" showing never before upheld as an obstacle to express federal enactments.

The landowners and businesspersons of California look to this Court, in this case, for relief and protection. The lower court's opinion herein has no bounds and is not in any fashion restricted to housing. It sets forth a standard whereby Berkeley could choose to adopt a totally controlled economy, dictating the price and availability of all goods and services in the city, and defend that this choice to abandon the competitive regime in favor of government control is rationally related to its local police powers. If one's objective is a price rollback, there is no "less intrusive means" than to simply compel one. We demonstrate herein that the decision below is faulty in its application of the Supremacy Clause to express federal enactments, and that Berkeley's ordinance clearly thwarts the economic objectives of the Sherman Act. By tracing the history of both the economic and the federalist policies of the Sherman Act, it is shown that the national policy is offended, while comity declines to tolerate Berkeley's conduct. Congress has ratified this Court's decisions declaring that only *state* policies and implementations thereof are exempt from the preemptive and prohibitive weight of the Sherman Act, and we establish herein that no California policy supports Berkeley's price-fixing scheme. The ultimate issue, we submit, is whether this Court should thoroughly undermine or override this Court's municipal "state action" precedents, as did the court below, in the immediate wake of the Congressional adoption of those decisions as legislative policy.

SUMMARY OF ARGUMENT

Where a state enacts a program to fix and manipulate the price of a commodity there unquestionably arises a conflict with federal statutory policy favoring free competitive pricing. As this Court adjudicated over forty years ago, however, the Congress did not intend to prohibit anticompetitive actions by a sovereign state in furtherance of state policy to displace competition with regulation, and so they are exempt from preemption.

Where a state program purports to authorize private parties to fix and manipulate prices, without adequate state control and supervision to ensure state policy is the predominant force, however, the conflict results in a judgment of invalidity, for the bounds of the exemption have been exceeded.

Just as with such state laws, municipal ordinances which fix and manipulate market prices are on their face in conflict with federal economic policy. They are exempt under existing precedent only where undertaken pursuant to affirmatively expressed state policy. In the absence thereof, as with the state program which exceeds the bounds of the exemption, the parochial activity is invalid pursuant to the supremacy of federal law.

This action presents a preemption challenge to municipal conduct which is plainly obstructive and hostile to national economic policies enacted by the Congress. At issue is naked price-fixing by a city government which has decided that the federal goal of open competition is undesirable and should be discarded in favor of market regulation by a locally constituted anti-capitalist bureaucracy.

Yet that choice to discard the national ideals of open competition and free setting of market price is clearly a prerogative preserved under our federalist system to Congress itself and, through Congressional deference, to state governments. As this Court's decisions and recent Congressional action demonstrate, Congress has the power to require cities to abide by Congressional economic policy with respect to economic activity affecting interstate commerce; and the operation

of rental housing is "unquestionably such an activity." *Russell* v. *United States,* 53 U.S.L.W. 4652 (No. 84-435, June 3, 1985). Out of federalist comity and political wisdom Congress has placed its confidence in the competence of state legislatures to make informed policy decisions displacing national competitive policy, while denying that discretion to local governments in the absence of such policy choices by their respective state sovereigns. The California State Legislature has never adopted any policy abandoning price competition in housing in favor of price regulation.

Much confusion has been engendered by the contention that all municipal programs throughout the lar d are placed at risk—with resultant chaos and public tragedies—should this Court simply reaffirm existing precedent and declare that only a state legislature can authorize municipal action which thwarts the economic objectives of the Sherman Act. Whatever may ultimately be adjudicated as to myriad municipal actions *not* before this Court herein, the instant arrangement in issue dictates prices to market participants with an avowed purpose of price stabilization—clearly thwarting those federal objectives. The most significant faults in these cries of impending doom are twofold: (1) All that is before the Court at this time is municipal price-fixing of independent traders' prices, certainly a very narrow segment of municipal activity, and (2) State legislatures are worthy of the confidence and respect afforded them by the Congress and are quite capable of discerning and responding to any pressing need for municipal regulation.

It is the cities, and not the Appellants, who display distrust for the states. Although they argue that essential municipal functions will be disrupted, in fact the vast majority of municipal functions have no direct impact on market freedom and are, in any event, duly authorized by "state action." As we demonstrate herein, California is the only state known to *amicus* wherein municipalities fix rents *without any* state law specifically addressing the issue; conversely, rent control is the only municipal price-fixing scheme in California *not* already enjoying state authorization. It is submitted that preemption of this pernicious practice will not have the broad, sweeping effects previously proclaimed by Berkeley and its supporters. It

will not even mean Berkeley may *never* control rents. It will simply mean that before Berkeley may subject the market to local price control it and other similarly situated municipalities will first have to persuade the State Legislature that a grant of the power and discretion to displace competitive freedoms with a controlled economy is necessary and appropriate to accomplish important public objectives.

It is that *allocation of power* issue which is at the heart of this dispute. Berkeley is understandably jealous of its independence to pursue its own "parochial interests." Confronted with well-established precedent holding that its independence stops short of the power to unilaterally declare itself immune from this economic policy of the Sherman Act, Berkeley has urged a rule that "health, safety, and welfare"-motivated restraints on trade be deemed compatible with federal economic policy irrespective of their market effects and despite the fact the Congress recently rejected such a formulation. Since it is well established that health, safety, and welfare roughly define the limits of the police power, the essence of the argument is that any police power action—and hence any action a city takes—is presumably immune to the Sherman Act's proscriptions and policies.

Price is the central nervous system of the economy. Any combination which tampers with price structures is illegal per se. It cannot be doubted at this point that the policy of the Sherman Act abhors and cannot abide non-market manipulation and stabilization of price. Congress has sanctioned *state* action in conflict therewith as a tolerable conflict pursuant to notions of federalism, while expressly defining the remedies for municipal action in conflict therewith, including preemptive injunction. The question whether and how political status enters this issue has been resolved by the Congress. Conflict is an *economic* issue, not a political status issue. Municipal rent controls produce the same types of market disturbances as would identical privately created price-fixing agreements which *unquestionably* would be condemned as Sherman Act violations. We submit that Berkeley's controls on private sector rents are in unavoidable conflict with federal statutory policy, enjoy no "state action" immunity, and are accordingly preempted by federal law.

ARGUMENT

I. THE POLICIES AND OBJECTIVES OF THE SHERMAN ACT ARE IN CONFLICT WITH BERKELEY'S PRICE-FIXING SCHEME

The Congress has established economic and political policies with regard to the Sherman Act. Those economic policies are clearly offended by any arrangement which interferes with the setting of price by independent market participants, as has been clearly and repeatedly declared by this Court. The political policy of the Sherman Act, as declared by this Court and ratified by recent Congressional action, is to *tolerate* for federalist comity reasons "state action" which places regulatory programs in conflict with federal economic policy, reasoning that *states* are entitled to the discretion to experiment with regulatory displacement of the competitive economic regime. That discretion, however, is reserved to *state* legislative bodies, and is not granted to municipal policymakers. The Congressional response to municipal efforts to overturn this Court's *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389 (1978) and *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982) decisions was to decline to do so, instead merely lifting the onerous sanction of *damage* judgments while consciously preserving injunctive remedies.

The confusion inherent in the opinion below and in Berkeley's and its supporters' positions taken to date, favoring a "health, safety and welfare" exception to the Sherman Act, is that it seeks to inject a new "political status" test into the question of substantive (economic) conflict with the Sherman Act. Regardless of its noble objective, this attempt to redefine the test of preemption is in reality little more than a shell game to disguise reassertion of arguments heretofore expressly denied by the Congress and this Court.

A. Freedom From Price Manipulation is the Very Heart of Sherman Act Economic Policy

This Court and the Congress have decided that, in the absence of clearly articulated and affirmatively expressed *state* policy displacing competition with regulation, municipal acts

which are anticompetitive in effect and thereby obstruct federal policy as expressed in the Sherman Act are preempted.

The course of conduct in which Berkeley is engaged is unquestionably price-fixing. A specific maximum rent is dictated for each of some 23,000 rental units. Ordinance, Appendix G at A-109, Sections 10-12. Noncompliance by any owner is punished by various remedies ranging from rent withholding by tenants to a year's imprisonment (*Id.*, Sections 11, 12, 13, 15, 19).

This is not the vague type of cause-and-effect found nonetheless to be a price-fixing arrangement in *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969). Here "a naked agreement [is] clearly shown, and the effect on prices is plain." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 733, 782 (1975). As in *Goldfarb*, the "agreement" derives from a coercive threat of sanctions. *See also Albrecht* v. *The Herald Co.*, 390 U.S. 145, 150 n.6 (1968); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 142 (1968); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

By enacting the Sherman Act, Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette* v. *Louisiana Power & Light Company*, 435 U.S. 389, 398 (1978). The prohibition against price manipulation is absolutely essential to the preservation of that regime of competition, for all variables in commerce revolve in some fashion around price: price is the "central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940).

This Court has repeatedly observed the seriousness of the threat price manipulation poses to market efficiency despite the claims of uniqueness, compelling need or salutary motive commonly made by price-fixers. Price-fixing has long been regarded a per se violation because generically it fundamentally disrupts normal market interaction, substituting for the "regime of competition" a regime of monopolistic or oligopolistic control. Because this displacement of the competitive regime tends invariably to impact upon market factors beyond the instant

fixed commodity, price-fixing is banned whether the effort is to fix minimum or maximum prices. *Albrecht* v. *The Herald Company*, 390 U.S. 145, 152-153 (1968); *Kiefer-Stewart Co.* v. *Joseph E. Seagram and Sons*, 340 U.S. 211, 313 (1951); *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 322, 348 (1981). Similarly, because it matters not to the resultant market effects, price-fixing is prohibited whether the prices are fixed by the sellers or (perhaps involuntarily) imposed upon them by another, third party. *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). As this Court succinctly stated in *United States* v. *McKesson & Robbins*, 351 U.S. 305 (1956):

> It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices. [351 U.S. at 309-310 (footnotes omitted).]

By enacting the Sherman Act, Congress has determined that competition in this Nation should be protected. Thus, the "Rule of Reason" often discussed in antitrust cases does not permit inquiry into the wisdom of permitting competition in various areas on a case by case basis.

> Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event, the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended. [*United States* v. *Socony-Vacuum Oil Co.* 310 U.S. 150, 221 (1940).]

> Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. [*Id.* at 226 n.59.]

This Court met head-on the issue of whether the "Rule of Reason" permitted an attack on the wisdom of preserving competition in certain areas in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). In that case, N.S.P.E. had adopted a canon of ethics prohibiting its members from submitting competitive bids for engineering services. The United States sought an injunction in a civil antitrust action to nullify the canon as a restraint upon competition. N.S.P.E. argued that the canon fell within the "Rule of Reason" because "competition among professional engineers was contrary to the public interest" (435 U.S. at 684) because it would result in degradation of the quality of engineering services with resulting risk to the public health, safety, and welfare. The Court had no qualms about rejecting this argument:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly upon the challenged restraint's impact on competitive conditions. [*Id.* at 688.]
>
> In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable. [*Id.* at 696.]

More recently, in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1981), the Court invalidated a presumably well-intentioned price-fixing agreement which was alleged to be procompetitive in effect. In that case, two Arizona medical foundations, by agreement of their member doctors, established the maximum fees the doctors could claim as payment for health services provided to policyholders of specified insurance plans. It was asserted that the fee schedules were "procompetitive" because they made it possible to provide health care consumers with a uniquely desirable form of insurance coverage that they could not otherwise afford. *Id.* at 349. The Court responded:

> The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law [per se rule] that is justified in its general application. [*Id.* at 351.]

These edicts leave no room for doubt that any arrangement, such as rent control, which " 'interfere[s] with the setting of price by free-market forces' (citation) is illegal on its face." *Professional Engineers,* supra, 435 U.S. at 696. It simply cannot be argued that other socially desirable objectives are met by suppressing competition. As cogently stated by Mr. Justice Stevens in the *Maricopa County* opinion, supra:

> Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. *United States* v. *Topco Associates, Inc.*, 405 U.S. at 611-612. Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the Legislature. Congress may consider the exception that we are not free to read into the statute. [*Arizona* v. *Maricopa County Medical Society,* supra, 332 U.S. at 354-355. *Compare,* Opinion below, 37 Cal.3d at 667-671, Appendix A at A-21-A-26.]

Before the Court in this case stands an ordinance with the avowed purpose to "regulate residential rent increases." Ordinance, Section 3, Appendix G at A-111. It is absolutely without question that were an organization of property owners to convene a meeting with such an objective this Court would find a criminal conspiracy in violation of Section 1 of the Sherman Act irrespective of the prices fixed or the conspirators' market

power, prior even to any overt act of adjusting the actual rents collected. *See, e.g., Maricopa County,* supra, 332 U.S. at 351; *Socony-Vacuum,* supra, 310 U.S. at 225-226 n.59. Even if it were shown to the Court's satisfaction that the fixed rents were reasonable and that the participants' objective was noble self-regulation imposed to police and prevent extraordinary and oppressive rent increases—even if the owners adopted verbatim Berkeley's entire statement of purpose (reproduced in Appendix G at A-111) and could establish conclusively their sincerity in those objectives—under the precedents it is clear that this Court nonetheless would have little choice but to declare that combination an unlawful affront to the Sherman Act. Berkeley's municipal status, acting as it is utterly without any sheltering state policy, should offer no different conclusions, for the economic policy of the Sherman Act, and the interplay of market forces which it seeks to preserve, are indifferent to the identity of economic saboteurs, responding only to the market damage they have wrought.

The disruption wrought by rent controls upon a housing market is well-understood by economists, although they may differ about the social utility of the economic dislocation. Despite its political attractiveness and resilience due to its dispensation of short-term monetary "bonuses" to a politically powerful local constituency, rent control as a solution to the housing crisis is a failed policy, an aggravant rather than the promised salve, much like the misguided folk remedy of buttering a burn. It produces illusory short-term symptomatic relief while geometrically worsening the problem, delaying or obstructing genuine curative measures.

With the imposition of a comprehensive scheme of market controls like Berkeley's[2] the competitive forces in the market become paralyzed. Deprived of the right to obtain a better price for a better product, product standardization and mediocrity set in. Market entry could not be better prevented than with the promise of oppressive regulation, so new supply of competing units is effectively foreclosed, locking in the existing imbalance of supply and demand and perpetuating the housing crisis. Without any means of maximizing profits by competing with features and services that could bring a better price, many owners must squeeze out what they can by trimming overhead—thereby reducing maintenance, service and the general quality of the housing stock. Owners become highly motivated to extricate their capital from such predatory abuse, and cities respond with prohibitions against condominium conversion, vacating or demolishing the building. With supply frozen and demand growing due to attractive, below-market rents, demand begins to spill over out of necessity into entry-level purchase dwellings, driving those prices skyward. In short, rent controls impact not only price but availability, variety, and quality of rental housing, as well as price and availability of entry level home purchases, and the construction, finance, material and title industries which would participate in the cash flow deterred by this effective bar to new rental construction. *See* Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 692 (1983). Nor does the exemption of new construction from controls assuage the fears of potential investors. As observed by Professor Muth, "Even if new units may be exempt from controls, potential investors in rented property may fear that new units will subsequently be made subject to controls, the actual experience in New York City." *Id.* at 696. Add to that the experience of the victims of Berkeley's own whims; the Ordinance (Section 5(f), Appendix G at A-114) repeals a former exemption for owner-occupied quadplexes and triplexes. Berkeley's treatment of owners who purchased or built properties in reliance upon that illusory exemption surely will not be ignored by prospective investors.

For purposes of determining whether rent controls conflict with federal economic policy, it is not so important that rent

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[2] Berkeley's scheme is far more restrictive than the moderate, state-authorized control systems common to Eastern states, notably in its denial of "vacancy decontrol," a common feature permitting the rent on a vacant unit to be brought up to market value on the initial reletting (*See* Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences,* 69 Cornell L. Rev. 517, 556 n.214 (1984)); its harsh restrictions on "pass-through" expenses, imposing regulators' judgments over those of the owner as to "necessity" or "avoidability" of refinancing or capital improvement (Ordinance, Section 12(c), (d), Appendix G at A-129, 130); and its complex restrictions upon unlawful detainer (*Id.,* Section 13, at A-131-136). The

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potential for abuse has been exacerbated by enactments effectively barring lessors—but not lessees—from sitting on the Rent Stabilization Board. [Berkeley Charter Amendment "N", Nov. 2, 1982, Section 121(3).]

control is meat-axe surgery as it is that it is surgery at all. It is unquestioned that rent control replaces the allocative efficiencies of the marketplace with redistributive inefficiencies sacrificing the regime of competition to other policies.[3]

Rent control is a very potent market interference which represents a local policy choice, a choice to discard the competitive regime in pursuit of some other imagined social policy or objective; recognition of those realities, that rent control *effectively* subverts normal market processes, and *purposefully* does so to pursue other policy goals distinct from antitrust policy, leads inexorably to the realization that such controls "conflict" with the objectives and policies of the Sherman Act. Berkeley has purposefully banished—criminalized, in fact—the competitive regime in favor of a fully controlled market in rental housing. This Court need not decide the policy questions regarding the efficacy or fairness of Berkeley's controls as a solution to housing inadequacies to find that Berkeley's scheme is preempted; rather, it is adequate to find that the Sherman Act policy protecting the "setting of price by free market forces," *United States* v. *Container Corp.*, 393 U.S. 333, 337 (1969), has been effectively and purposefully displaced by a local ban on the very conduct encouraged by federal law. The federal and local statutory schemes are in express conflict, since the facial subjugation of lessors to Berkeley's dictates certainly creates a "combination in restraint in trade." Even more evident, however, is the obstacle that Berkeley's scheme presents to the attainment of a central objective of the Sherman Act, the setting of price by free market forces. As stated by Professor Tribe,

> But state and federal laws need not be contradictory on their face for the latter to supersede the former: there are more subtle forms of actual conflict. Even if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie federal enactments. Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage. [Tribe, *American Constitutional Law,* Section 6-24 (Foundation Press, 1978). See also *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967); *Jones* v. *Rath Packing Co.,* 430 U.S. 519 (1977).]

[3] *See* Muth, supra; Siegan, *Commentary on Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 733 (1983); Baird, *Rent Control; The Perennial Folly* (1980) at 54-78; *Rent Control, a Popular Paradox* (Fraser Institute Ed. 1975); Rabin, *The Revolution in Residential Landlord-Tenant Law,* 69 Cornell L. Rev. 517, 555 (1984); Friedman & Stigler, *Roofs or Ceilings? The Current Housing Problem,* in *Rent Control, a Popular Paradox,* supra, at 100; Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws,* 69 Cornell L. Rev. 604, 609-610 (1984).

There can be little doubt that the economic purposes, objectives and effects of Berkeley's scheme obstruct the attainment of the purposes and objectives of the Sherman Act in the Berkeley housing market. *See Hines* v. *Davidowitz,* 312 U.S. 52 (1941). "Conflict" exists. The remaining question is whether the Congress intended to tolerate this conflict, or to preempt such anticompetitive municipal action under these circumstances.

B. The Federalist Policy of the Antitrust Laws Does Not Excuse Berkeley's Schemes

Local action is preempted by federal statute where the former discourages or prohibits conduct the federal enactment seeks to encourage. Where the Congress has indicated an intention to tolerate conflicting regulation by states or local entities, however, no preemptive intent exists.

In *Parker* v. *Brown,* 317 U.S. 341, this Court determines that a state raisin pricing scheme, although clearly in conflict with Sherman Act economic policy, *Id.* at 350, nonetheless was insulated by a state action exemption. The Court found that given the federalist considerations, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress," *Id.* at 351.

More recently, in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum,* 455 U.S. 97 (1980), a limitation upon that state exemption became clear: If the anticompetitive decisions are not in fact being made by the state, but by private parties, and the state is not supervising their activity (so as to ensure adherence to state policy), this exemption is lost and the price-

fixing scheme is invalid *despite* its statutory roots. *See Town of Hallie* v. *City of Eau Claire,* 105 S.Ct. 1720 n.10 (1985).

The issue of preemptive intent as to political subdivisions of the state—sometimes referred to alternatively as "immunity" or "exemption"—has been addressed recently. In *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1978), this Court held that the "state action exemption" of *Parker* is not freely available to cities, stating that,

> "Plainly petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a state, are, simply by reason of their status as such, exempt from the antitrust laws." [435 U.S. at 408.]

The Court concluded that the *Parker* doctrine protected only that anticompetitive conduct

> "[E]ngaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." [435 U.S. at 413.]

Thus, unlike the *Parker* approach which gave the *states* as sovereigns the benefit of an implied exclusion, the *Lafayette* decision requires that *cities* claiming exemption demonstrate that the key policy choice to subjugate the competitive regime to regulation was indeed a choice made by the *state* as sovereign. The Court noted that the Congress had demonstrated its capacity to clearly confer municipal antitrust exemptions where deemed necessary, 435 U.S. at 397 n.14, and that the purposes of the *Parker* doctrine are not served by subjugating federal policy to local action which is *not* sovereign action, 435 U.S. at 408-413.

Also raised and rejected in *Lafayette* is the now-familiar claim that municipal conduct is not really within the purview of antitrust law because, unlike private business conduct, it is not motivated by private profit and power. This Court observed that,

> Petitioners next argue that the antitrust laws are intended to protect the public only from abuses of private

> power and not from actions of municipalities that exist to serve the public weal.
>
> Petitioners' contention that their goal is not private profit but public service is only partly correct. Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipality owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders. [435 U.S. at 403.]

That observation, that the municipal objective of furthering a constituent interest is no more procompetitive or economically beneficial than the profit motive of private businesspersons, is even more cogent in the case of rent control which sacrifices one small constituent interest to the benefit of a larger constituency, imposing economic costs on the entire city as well as interstate components of housing simply to please one well-organized group.

This Court also addressed in *Lafayette* the suggestion, heard still, that municipalities can never really stray too far too long from that path of wisdom and justice because of the self-correcting nature of politics; yet clearly, the victimized minority, many of them disenfranchised nonresidents, cannot politically compete in this battle between market freedom and the raw self-interest of the incumbent tenant constituency. Nor should that political struggle be *necessary* for the policy choice has already been made by the Congress.[4]

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[4] As the Court noted in *Lafayette,* the claim that "political control" renders federal antitrust regulation unnecessary is without merit, for that could be said as well of private anticompetitive activity and misses the point that Congress has "mandated competition as the polestar" of economic policy and "did not leave this fundamental national policy to the vagaries of the political process." 435 U.S. at 405-407.

Because of the market power wielded by cities, and because they naturally have motives, as does a businessperson, to thwart the competitive regime in pursuit of their objectives, this Court has reasoned that the existence of a coherent national economic policy would be endangered by the prospect of some 63,000 independent entities, each practicing its own peculiar brand of economic policy:

> When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is though to engender. If municipalities were free to make economic choices counseled solely by their own parochial interest and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. [435 U.S. at 408; footnote omitted.]

Certainly a city's power to distort the market as a buyer or seller is dwarfed by the dislocations offered when it imposes upon the *entire* market the iron fist of government dictate.

Because of the risks posed by a proliferation of municipal anticompetitive conduct to the national economic policy—because of an inherent tension between "parochial" objectives and national economic objectives—this Court declined in *Lafayette* to craft an implied exclusion for municipalities: "We conclude that these additional arguments for implying an exclusion for local governments must be rejected." 435 U.S. at 408. This Court then determined that cities could not avail themselves of their states' *Parker* exemptions unless the cities' conduct is "state action," defined as conduct pursuant to a state policy choice to displace competition:

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker's* limitation of the exemption to "official action directed by a state," 317 U.S., at 351, 63 S.Ct., at 313, is

consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, *see* supra, at 1131-1134, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

* * *

We therefore conclude that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. [435 U.S. at 412-413 (footnote omitted; citations omitted).]

Similar considerations led to a similar conclusion in *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40 (1982). Again in *Boulder* this Court had to confront the claim that cities share in the sovereignty of their states, even though that issue had in fact been resolved in 1890 at the time the Sherman Act was enacted. *See Lincoln County* v. *Luning,* 133 U.S. 529 (1890), and *Lafayette,* supra, 435 U.S. at 412 n.42. The uniqueness which perhaps justified renewal of the claim in *Boulder* was that city's status under a "home rule" provision of the state constitution, which confers a form of *intra-state* sovereignty. This novelty persuaded the Tenth Circuit that Colorado's constitutional grant of municipal autonomy effectively vested the state's "sovereignty" in the city. 630 F.2d 704, 707. This Court reversed, reaffirming that in federalism sovereignty may not be partitioned and distributed like so many slices of an apple:

> But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A state that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions

for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject of the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged, "we are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City." 630 F.2d, at 707. . . . Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require. [455 U.S. at 55-56.]

Yet the approach adopted by the California court and defended by Berkeley herein would no less eviscerate those precedents. If, as seems clear from the *Lafayette* and *Boulder* opinions, cities are "persons" subject to the Act, and the Congressional intent was to tolerate regulatory experimentation by fifty sovereign *states* without inviting the chaos of 63,000 independent mini-sovereigns declaring their own economic policy displacing that of the federal government, then the "California test" is an anathema to federal policy, for its patent objective and eminently predictable result is to free municipalities to pursue parochial interests at the expense of national economic policy. Its sanction by this Court would require nothing less than a full recantation of not only the *conclusions* of *Lafayette* and *Boulder,* but also the basic reasoning of both cases as well as others, most notably *Garcia* v. *San Antonio Metropolitan Transit Auth.,* 105 S.Ct. 1005 (1985).

Garcia is directly implicated because Congress has now spoken clearly and succinctly as to its intentions for municipal coverage under the Sherman Act. The legislative history of the Local Government Antitrust Act of 1984, P.L. 98-544, is in fact a sterling example of the political accountability and responsi-

veness of Congress to the needs of local government. That was central to *Garcia's* rationale that the political process, and not some constitutional limitation on Congressional power, provided the safeguard for local concerns in a federalist system. Highly reminiscent of Mr. Justice Stevens' admonition in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978), that exemption arguments based on policy are best addressed to the Congress,[5] the experience of local governments seeking a blanket exemption demonstrated that while they cannot always get what they want, they can and did get what they needed.

What the cities *got* from Congress was what they *needed*—an exemption from the potentially catastrophic remedy of damage judgments for antitrust violations. What the cities *wanted* yet were consciously denied by the Congress was a blanket exemption for *all* governmental action, or at least all such action taken in pursuit of "health, safety, and welfare." It is that exemption, expressly and consciously denied by Congress, which Berkeley now seeks to uphold.

The Legislative History of P.L. 98-544 amply demonstrates that Congress considered and rejected express exemptions of the variety now sought to be inserted into the Sherman Act by judicial implication. Details of a number of "health, safety and welfare" exemptions considered and rejected by the Congress are set forth in our *Amicus Curiae* Brief in Support of the Jurisdictional Statement at 11-14.

Unlike the 51st Congress which enacted the Sherman Act without leaving any express record of intent toward or even consideration of municipal action, the 98th Congress has left a straightforward record of its consideration *and rejection* of substantive changes in the definition of conduct offending the antitrust laws. The House Judiciary Committee Report to the Committee of the Whole House on H.R.6027, H.R.Rep. 98-965, 98th Cong., 2d Sess. (1984), recites in some detail the proposals placed before the Congress as well as the vast and

[5] "That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason." [435 U.S. at 689-690.]

varied testimony presented to them on the issue. That Report is by no means uncertain as to whether Congress had intended to modify the substantive law:

> Although the Committee received testimony favoring broader immunity for local governments, it chose at this time to address only the issue of antitrust damage suits.
>
> * * *
>
> H.R.6027 would in no way limit the antitrust immunity for States that the courts have recognized in Parker v. Brown, 317 U.S. 341 (1943), and subsequent decisions interpreting the "state action" doctrine. *The bill eliminates certain damage suits under the Clayton act without altering judicial interpretation of the substantive antitrust law. For example, there will be no change in the substantive antitrust law applicable to local governments, or persons with whom they deal, in suits for injunctive relief under Section 16 of the Clayton Act, or in enforcement actions by the Department of Justice or the Federal Trade Commission under other statutory provisions.* [*Id.* at 2 (emphasis added).]

The Report also describes the urgings for a "municipal rule of reason," strikingly similar to the rule declared below, which was rejected by the Congress. Finally, the Report reveals the Congressional reasoning which led to the rejection of wholesale substantive exclusions for municipal acts:

> The Subcommittee did not adopt the concept of a ban against private actions aimed at municipalities and their officials. The role of "private attorneys general" in the antitrust enforcement scheme remains central. *If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.* The record does support, however, the notion that municipalities—and their taxpayers who must ultimately shoulder the burden—should not be subject to punitive sanctions in the form of treble damages. [*Id.* at 18 (emphasis added).]

It is fair to state, then, that the policy considerations underlying the lower court's opinion, and particularly a "health, safety, welfare" defense limited only by a "less restrictive" means test, have been carefully considered by Congress, and a Congressional judgment has been made that such sweeping changes in substantive application of the laws were not warranted at this time.

II. BERKELEY IS NOT ENGAGED IN "STATE ACTION"

Berkeley urged below that its price-fixing activity was exempt from antitrust scrutiny pursuant to the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 343 (1943). Under that doctrine, rooted in the federalist relationship between states and the Nation, this Court perceived that Congress had intended to exempt from antitrust coverage the "state or its officers or agents" engaged in "activities directed by its legislature." *Id.* at 350-351.

Subsequent cases have made clear that cities share in the state's exemption only to the extent they meet that description. Acting as agents of the state implementing policy directions by the legislature, they are deemed to be engaged in "state action." The issue has evolved into a test turning upon the existence of a "clearly articulated" and "affirmatively expressed" state policy to displace competition with regulation in the questioned activity. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410, 413 (1978); *Community Communications Co.* v. *City of Boulder* 455 U.S. 40, 51 (1982); *Town of Hallie* v. *City of Eau Claire*, 105 S.Ct. 1713, 1717 (1985).

This Court emphasized in *Boulder* that mere *neutrality* on the part of the state would not invoke the exemption, for federalist comity gained nothing from derogation of national policy: "to permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws . . . without furthering the policy underlying the *Parker* 'exemption'." 455 U.S. at 55-56; *see also Lafayette*, 435 U.S. at 415.

The relevant portions of statutes whereunder Berkeley has lately sought exemption below are reproduced in the Jurisdictional Statement at pages 4-5. They are without

exception expressions of neutrality toward controls or specific prohibitions on imposition of controls upon various types of housing. Nowhere therein is there to be found any expression of policy favoring such controls. As the Court below noted, "California has no state rent control statute." 37 Cal.3d at 655, Appendix at A-6.

The court below was extensively briefed on this issue, ruled that it was properly raised therein, Opinion below, 37 Cal.3d at 654 n.3, Appendix at A-5 n.3, and declined to rule thereon, relying as it did on its novel approach to preemption analysis and antitrust law. *Id.* at 678, A-35. This question of congressional exemption from federal law is ultimately a question of federal law. *Town of Hallie,* supra, 105 S.Ct.at 1719 n.8. Since it was properly presented to the state court, and that court declined to rule thereon, the issue is properly justiciable in this Court. *Chambers* v. *Mississippi,* 410 U.S. 284, 290 n.3 (1973). We respectfully request this Court to acknowledge the obvious, that Berkeley's price-fixing scheme reflects only the policy of the City of Berkeley and not that of the State of California.

CONCLUSION

Berkeley has made a judgment that competition in housing was producing results conflicting with its social engineering policies. Its response was to reject the free market in favor of price-fixing, conferring a short-term pocketbook favor upon a favored, supportive constituent bloc (tenants) at the expense of a disfavored, nonsupportive minority of landowners and businesspersons, and to the exclusion of prospective tenants who otherwise would move to Berkeley and compete economically for rental properties. Berkeley's scheme has all the earmarks of a per se illegal buyers' cartel, restricting output, barring market entry, and banishing price competition and, indirectly, *quality* competition altogether. As forewarned by this Court in *Lafayette,* Berkeley's governmental status does not detract from the fact that just like a businessperson it has its own set of goals and objectives distinct from those of the Sherman Act which Congress *intended* to protect.

The opinion below would permit any city to fix the price of any or all commodities without any affirmative sanction from either the Congress or the state. Certainly this was not the Congressional intent. Conversely, a finding of preemption herein will merely mean that should the State of California truly intend to authorize Berkeley's price-fixing practices its Legislature needs only to enact a law so stating. Certainly the existing state laws offer no hint of such a policy, although all or virtually all other anticompetitive municipal programs in this State and elsewhere enjoy express authorizations.

Rent control is price-fixing which has no *economic* novelty to it which justifies its removal from the per se realm of illegality. It is a wilful abandonment of Congressional competitive policy. Congress has just reaffirmed its intent to control anticompetitive municipal action which lacks state policy to justify itself. Such is the case here. We respectfully urge this Court to declare Berkeley's ordinance preempted by the Supremacy Clause of the United States Constitution because it fatally conflicts with the Sherman Act.

DATED: August 1, 1985

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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,

Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether a municipal ordinance enacted without any state authority is shielded from antitrust scrutiny when it imposes ceilings on the price which property owners may charge for rental housing.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	ii
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE ORDINANCE IS A MECHANISM FOR PRICE-FIXING AND IS THUS A PER SE VIOLATION OF THE SHERMAN ACT	3
A. It Is Unassailable That The Rent Control Activity Called For In This Ordinance Has Significant Anticompetitive Effects	3
B. The Anticompetitive Impact Of The Ordinance Clearly And Significantly Affects Interstate Commerce	12
C. A Municipality's Participation In A Price-Fixing Scheme Without State Authority Does Not Exempt It From Antitrust Scrutiny	15
D. The Ordinance Facially Conflicts With The Sherman Act And Is Thus Preempted Under The Operation Of The Supremacy Clause	17
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Albrecht v. Herald Co., 390 U.S. 145 (1968)	5
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	15, 17
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	3, 10, 16, 18
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	10, 15, 16
Gough v. Ross-Moor Corp., 487 F.2d 373 (9th Cir. 1973)	12, 14
Hines v. Davidowitz, 312 U.S. 52 (1941)	18
McClain v. Real Estate Board of New Orleans, 444 U.S. 232 (1980)	13
Penn Central Transportation Co. v. City of New York, 42 N.Y. 2d 324, 366 N.E. 2d 1271 (1977), *aff'd*, 438 U.S. 104 (1978)	9
Perez v. United States, 402 U.S. 146 (1971)	13
Rice v. Norman Williams Co., 458 U.S. 654 (1982)	17
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)	18
Southern California Gas Co. v. Public Utilities Commission, 23 Cal. 3d 470, 153 Cal. Rptr. 10, 591 P.2d 34 (1979)	9
Town of Hallie v. City of Eau Claire, —— U.S. ——, 53 U.S.L.W. 4418 (March 27, 1985)	16
Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (1982)	12
United States v. Container Corp. of America, 393 U.S. 333 (1969)	17
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	17
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	17
Constitutional and Statutory Provisions	
Local Government Antitrust Act of 1984, 15 U.S.C. § 35	17
Sherman Act, 15 U.S.C. § 1	*passim*

TABLE OF AUTHORITIES—Continued

Other Authorities	Page
Bureau of the Census, U.S. Department of Commerce, *Construction Reports*, Authorized Construction, Washington, D.C. Area, Series C41 (1976)	5
D. McCloskey, *The Applied Theory of Price* (1982)	3
E. Achtenberg, *The Social Utility of Rent Control* in *Housing Urban America* (Pynoos, Schafer, and Hartman ed. 1973)	6
H. Wexler and R. Peck, *Housing and Local Government* (1975)	5
J. Brenner and H. Franklin, *Rent Control in North America and Four European Countries* (1977)	5
Johnson, *Rent Control and the Distribution of Income*, 41 Amer. Econ. Rec., Papers and Proceedings 571 (1951)	8
Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691 (1983)	3
P. Niebanck, *Rent Control and the Rental Housing Market in New York City* (1968)	5, 6
Presidential Panel Calls for Ban on Rent Control, 68 A.B.A.J. 903 (1982)	4
Rabin, *The Revolution in Residential Landlord-Tennat Law*, 69 Cornell L. Rev. 517 (1984)	3
Rent Control: Myths and Realities, (The Fraser Institute ed. 1981) (selected essays)	*passim*
Rethinking Rent Control, 12 Rutgers L.J. 617 (1981)	8, 9
Siegan, *Commentary on Redistribution of Income Through Regulation In Housing*, 32 Emory L.J. 721 (1983)	4
Sullivan, *Handbook of Antitrust Law* (1976)	12
The President's Commission on Housing, *The Report of the President's Commission on Housing* (1982)	14
Washington Post, December 12, 1977	5
Washington Post, January 16, 1978	7

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RICHARD LAWHORN and ANTHONY KERSHAW,
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BERKELEY CITY COUNCIL; and
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Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

INTERESTS OF AMICUS CURIAE, WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 185,000 members, contributors and supporters throughout the United States (many of who reside in cities with rent control) whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared as *amicus curiae* in a number of Supreme Court cases dealing with the rights of businesses and individuals. In

addition, WLF has appeared before regulatory agencies which have sought to restrict the rights of businesses.

WLF believes that the price controls that the City of Berkeley has imposed on the rental housing market is deleterious to the local and national economy and contrary to the public interest. In the name of helping lower income renters, advocates of rent control are actually hurting those they profess to care about most. In the process, the City of Berkeley is forcing certain private citizens to subsidize this failed social experiment which also violates federal antitrust laws.

SUMMARY OF ARGUMENT

The ordinance in question plainly fixes the prices of rents in violation of the Sherman Act. The anticompetitive effects of such action are obvious and pernicious. These effects include: perpetuated housing shortages, increased deterioration of housing stock, increased cost of housing, misallocation of housing stock, and increased concentration in the housing market. The threat of increased concentration is particularly present in this case because of the inevitable delays in the inflation adjustment procedure and the inequitable return on investment standard imposed. These anticompetitive effects should not be weighed against the alleged redeeming virtues of the ordinance. Even if such virtues were weighed, they would not justify the anticompetitive effects.

The anticompetitive impact of the ordinance clearly and significantly affects interstate commerce. The local activity of rental housing is a sufficient basis for Sherman Act jurisdiction. The ordinance itself contemplates a widespread impact. Moreover, as a matter of practical economics, the anticompetitive effects of the ordinance affect interstate commerce.

The ordinance is not exempt from antitrust scrutiny since it neither constitutes the action of the State of California nor implements clearly articulated and affirmatively expressed state policy. Thus, since the ordinance facially conflicts with the Sherman Act and is not exempt from antitrust scrutiny, it is preempted under the operation of the Supremacy Clause.

The opinion below flatly contradicts clear teachings of this Court by authorizing municipalities to violate the Sherman Act through a "public welfare" defense. Moreover, the increasing pervasiveness of rent control laws, already adopted in more than 50 cities in California and over 500 communities in this country, makes these antitrust issues of sufficiently great public importance to resolve.

ARGUMENT

I. THE ORDINANCE IS A MECHANISM FOR PRICE-FIXING AND IS THUS A PER SE VIOLATION OF THE SHERMAN ACT.

A. It Is Unassailable That The Rent Control Activity Called For In This Ordinance Has Significant Anticompetitive Effects.

The rent control activity mandated by the Berkeley ordinance has been condemned by virtually all economists.[1] W. Block, Preface in *Rent Control: Myths & Realities* xiv (The Fraser Institute edit. 1981) (essays by sixteen economists); Rabin, *The Revolution in Residential Landlord-Tenant Law*, 69 Cornell L. Rev. 517, 555 (1984); Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691, 698 (1983). In fact, such near universal condemnation of rent control represents the widest consensus within the economics profession. Block, *supra*. These economists have concluded from ample empirical evidence that rent control schemes cause "serious economic dislocation." *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S.

[1] It is clear why there is such disapproval. Because the government forbids rentals above the old price, a landlord has no incentive to surrender more housing, and tenants are unable to express in money offers to the landlords their new and larger willingness to pay for housing. Thus, the social welfare loss results which represents the sum of consumers' and producers' surplus foregone. D. McCloskey, *The Applied Theory of Price* 214 (1982).

389, 412-413 (1978). For example, Nobel Prize economists Milton Friedman and George Stigler conclude that "Rent ceilings, therefore, cause haphazard and arbitrary allocation of space, inefficient use of space, retardation of new construction and a future depression in residential building. Formal rationing by public authority would probably make matters worse." M. Friedman & G. Stigler, *Roofs or Ceilings? The Current Housing Problem reprinted in Rent Control: Myths & Realities*, at 102. Thus, it is unsurprising that the President's Commission on Housing called for a ban on municipal rent ceilings. *Presidential Panel Calls for Ban on Rent Control*, 68 A.B.A. J. 903, 904 (1982).

The most harmful economic effect of rent control is its negative impact on the production of housing. For example, the "fair return" approach of the ordinance will actually perpetuate house shortages. "Fair return" destroys the signalling role that profits normally play in an economic system. Where demand for a particular product (like housing) rises, suppliers temporarily receive profits in excess of "fair" or "normal" levels. The existence of these high profits is what induces an increased supply. To the extent high profit rates are not realized, they have the effect of discouraging housing construction and perpetuating housing shortages. R. Ault, *The Presumed Advantages and Real Disadvantages of Rent Control reprinted in Rent Control: Myths & Realities*, at 77. This point has been frequently made in public hearings and discussions. Builders and lenders virtually swore to the Regulations Committee of the President's Commission on Housing that they would never invest in rental housing construction in a community subject to rent controls, even if those controls did not apply to newly constructed housing. Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 721, 723 (1983). Data from rent control areas fully support the notion that rent control discourages housing production. In England, where strict rent controls have been in effect

for over sixty years, the production of private rental housing has been at such a low level that the percentage of households living in this type of housing has dropped from 61 percent to below 15 percent. J. Brenner & H. Franklin, *Rent Control in North America and Four European Countries* 4 (1977). In New York City the number and percentage of persons living in this type of housing also declined. P. Niebanck, *Rent Control and the Rental Housing Market in New York City* 29 (1968). In Washington, D.C., with only brief experience of rent control, the number of units available for rent fell by 8,000 units, *Washington Post*, December 12, 1977, Section A at 1, and the number of multifamily building permits fell from 7,263 in the first four months of 1973 to 220 in the first four months of 1976. Bureau of the Census, U.S. Department of Commerce, *Construction Reports*, Authorized Construction, Washington, D.C. Area, Series C41 (1976).

Maximum rent schemes also may be fixed too low to encourage, or even permit, landlords to furnish services or facilities deemed necessary or desirable by their tenants. *See Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968). This deterioration of housing stock is well supported by research. Empirical results reported by Moorhouse, Sternlieb and RAND show that rent control does lower the level of maintenance of buildings, all other things (including age and condition) being equal. *See* H. Wexler & R. Peck, *Housing and Local Government* 65 (1975).[2] Thus, by promoting the deterioration of rent-controlled buildings and reducing the quality of housing, rent control in another way effectively reduces the quantity of housing services available in the City.

Rent control increases the cost of providing rental housing. Because of the existence of rent control or the threat of its adoption which have the effect of increasing

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[2] In New York City 29 percent of the rent controlled units are deteriorated as opposed to 8 percent of the uncontrolled units. Niebank, *supra* at 120.

the risk associated with investing in rental housing, investors will require the payment of higher interest rates as compensation. R. Ault, *The Presumed Advantages and Real Disadvantages of Rental Control in Rent Control: Myths & Realities, supra* at 71. Since over 40 percent of rent revenues are used to pay debt charges, E. Achtenberg, *The Social Utility of Rent Control in Housing Urban America* (ed. Pynoos, Schafer, and Hartman) 437 (1973), a slight increase in the rate at which these buildings are financed can have a substantial impact on rent levels.

Rent control also is likely to result in a misallocation of the existing housing stock. Ault, *supra* at 70. This occurs when tenants are deterred from moving because the increased difficulty of locating a vacant unit (a result of reduced new construction) and the loss of subsidy associated with tenure. Thus, young, growing families will be inclined to endure crowding rather than relinquish their subsidy, while older tenants remain in larger units as their family size declines with other children leaving home. Niebank, *supra* at 159-160.

The oppressive individual inflation adjustment procedures of this ordinance will increase the concentration in the housing market. As one commentator astutely observed:

> The complexity of appeals may be such that only those landlords who deal with the rent control bureaucracy on a frequent basis are able to comply with the procedures necessary to obtain a rent increase approved [sic]. The nuisance factor alone may be sufficient to cause many small-scale landlords to leave the market.

Ault, at 80 n.34. The ordinance especially threatens small-scale landlords when the harsh nature of procedural delays, inflation, and the return on investment standard are fully understood.

The ordinance unreasonably imposes inherent procedural delays in rent adjustment when it precludes consideration of the effect of inflation in authorizing general adjustments in rent ceilings and requires a petition on an individual basis for this factor to be considered. The court of appeals below correctly concluded that "this results in an inexcusably cumbersome rent adjustment procedure not reasonably related to the ordinance's stated purposes of preventing unwarranted rent increases and therefore deprives landlords of due process of law." 195 Cal.Rptr. 836, 837 (Cal. App. 1 Dist. 1983).

The opinion below asserts that the provisions in the ordinance of no certificate requirement, consolidation, power to appoint hearing examiners, finality of decision, and a time limit of 120 days avoid the delay in the individual adjustment process. 693 P.2d 261 (1984). How these provisions would actually avoid delay is not explained. Moreover, it is plain that these provisions have little effect on delays, much less avoid them. With over 23,000 rental units in Berkeley, the filing of separate petitions by individual landowners would still result in a thousand or more evidentiary hearings. Jurisdictional Statement at 26. In addition to these hearings, this procedural morass requires the Board to: (1) review all information provided by the applicants, including complex financial and tax data; (2) review comments received from tenants. 693 P.2d at 298. The true uselessness of the 120 day time limit is obvious since the ordinance authorizes unlimited extensions "for good cause." Ordinance Section 12(b)(12); J.S. App. at A-128. Thus, most decisions take hundreds of days. Reply at 10 n.8.

Such long delays are confirmed by the experiences of other urban areas. Ault, at 78 n.11. For example, in Washington, D.C., appeals for rent increases generally take six to ten months to resolve, despite the fact that the rent control statute requires that decisions be made within ninety days. *Washington Post*, January 16, 1978, section C at 1.

Not only does the ordinance impose inevitable delays but it requires prohibitive filing fees. The annual filing

fees for such petitions would exceed $1.5 million. J.S. at 26 n.3.

Appellant amply illustrates the serious impact of inflation on the landowners. J.S. at 25 n.22. Assuming an owner's monthly profit on May 31, 1980 was $100, inflation had reduced its value in real terms to $56.80 by the end of 1983. A landowner can only be compensated, if at all, for such a loss via the onerous individual petition process. Using 1979 as a base year, the inflation rate increased 43.2% by December, 1983 in the San Francisco-Oakland area. Using a 1977 base year, which corresponds to the initial rent fixing law, the inflation rate was 70%. *Id.*

It should not be assumed that landowners are in better economic condition to deal with substantial inflation losses than the supposedly protected class of tenants. "In fact, individual tenants frequently have incomes which are *higher* than their landlord's, and to our knowledge, no body of evidence exists which indicates that on average tenants have significantly lower incomes." Ault at 57 (emphasis added).[3]

Many small-scale landowners are further squeezed by the unfairness problems present in the return on investment standard. First, the return on investment standard is unfair to the owner who took by gift, inheritance, or devise, has obtained 100 percent financing, or has converted his investment into debt through refinancing. Since the owner has invested nothing, the return on investment standard dictates he gets no profit for operating his building. Comment, *Rethinking Rent Control*, 12 Rutgers L.J. 617, 645 (1981).

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[3] D. Gale Johnson investigated the issue in detail years ago and concluded, "I do not want to argue that the evidence presented indicates that landlords are poorer than tenants. But the data certainly do not indicate the contrary—that landlords have significantly higher incomes than tenants." Johnson, *Rent Control and the Distribution of Income*, 41 Amer. Econ. Rev., Papers and Proceedings 571 (1951).

The return on investment standard also unfairly penalizes long term owners. Identical units may have been purchased at different prices because they were bought several years apart. Thus, owners who have held their units for a long period of time will be limited to lower rents.

Other difficulties flow from the use of the return on investment standard. Since investment is measured in dollars, rather than by percentage of selling price, the return on investment standard is unfair to the owner who invested when dollars were effectively worth more than they are today. *Id.* The return on investment standard also makes the amount of rent a tenant pays dependent upon the financing terms the owner has been able to negotiate. *Id.*

Unlike the return on investment standard, the return on value standard urged by appellants overcomes its problems. The court below rejected the return on value standard. That rejection was based on the erroneous premise that a return on value standard is circular and unworkable because the determination is based on rents thereby creating a never-ending upward spiral. However, circularity is avoided by use of "historic" value, such as value just prior to the adoption of rent control. Comment, 12 Rutgers L.J. at 641. This approach avoids circularity since future rents would not be used in the valuation. This is consistent with the standard that governs another area of public use—the regulation of public utility rates. The public utility standard provides for a reasonable return on the current value of the property, *Penn Central Transportation Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 1275 (1977), *aff'd*, 438 U.S. 104 (1978), or the value of the property at the time it was devoted to public use. *Southern California Gas Co. v. Public Utilities Commission*, 23 Cal.3d 470, 474, 153 Cal. Rptr. 10, 12, 591 P.2d 34 (1979). Other ap-

proaches such as replacement cost or comparable sales in balanced markets indicate that circularity is not an obstacle to using the return on value standard.

Finally, there are few, if any, "redeeming virtues" in this ordinance to justify its pernicious anticompetitive effects. Section 3 points to alleged public welfare features which supposedly justify rent control: The ordinance is intended "to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of this City with regard to low and fixed income persons, minorities, students, handicapped and the aged." However, such socially redeeming features should not be weighed to offset anticompetitive effects. Justice Lucas, in his dissent to the opinion below, correctly noted that "to allow a local governmental entity to excuse a price-fixing scheme on the basis of asserted public health, safety or welfare considerations would enmesh the courts in an impossible task of weighing the 'apples' of social welfare with the 'oranges' of antitrust policy. 693 P.2d at 317 citing *Boulder*, 455 U.S. at 67 (Rehnquist, J., dissenting). Moreover, such weighing of social factors would, in effect, place "no practical limits whatever on the authority of a municipality to tamper with the price structure established by the openmarket." *Id.* at 317. If municipalities "were free to make economic choices . . . without regard to their anticompetitive effects, a serious chink in the armour of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *City of Lafayette v. Louisiana Power Light Co.*, 435 U.S. 389, 408 (1978).

Even if such social welfare factors were weighed, they would not justify the patent anticompetitive effects because the ordinance imposes unnecessary restrictions on the economic freedom of landowners that are not substantially related to the accomplishment of governmental goals. The ordinance resorts to the extreme measure of rent control as a form of housing policy. It does so without requiring the bona fide housing emergencies that existed in World War I and World War II which first gave rise to rent controls. The condition of "unwarranted rent increases" hardly qualifies as a dire emergency. Even if such a condition were considered an emergency, the permanency of the rent control measures are unnecessary.

The ordinance also erroneously assumes that absent rent control, unwarranted rent increases will occur. That assumption ignores the ability of tenants to protect themselves. Even if tenants were to respond to increases by continuing to demand the same amount of housing, this does not mean they will pay a higher price if they can obtain a similar unit from another landlord at a lower price. Even if all landlords raised their rents, they would soon be faced with competition from the owners of newly constructed units. Ault at 63. Nevertheless, empirical evidence demonstrates that tenants will not demand the same space in response to rent increases.[4]

The ordinance unreasonably and unnecessarily restricts economic freedom because there are alternative means to solving rent increases more consistent with the free market system. As Justice Lucas, in his dissent to the opinion below, accurately noted:

> If the city fathers (and mothers) believe that rents are too high in Berkeley, several solutions come to

---

[4] A 1 percent increase in the price of housing will result in a reduction in housing consumption of between 0.7 percent and 1.7 percent. Ault at 63.

> mind which would be more consistent with the operation of the free market system. Rent subsidies may be provided to needy tenants. Public housing projects may afford additional rental units. Property may be municipally acquired through negotiated purchase or condemnation. (cities omitted).

693 P.2d at 318. Ironically, the ordinance will exacerbate, not solve, the social problems cited. For example, rent control measures actually promote racial discrimination. Ault at 61. Absent rent control, landlords who engage in discriminatory practices would be faced with the necessity of accepting either lower rents or higher vacancy rates. Under rent control, these same practices will cost them nothing, and thus they will be more inclined to engage in them. This type of discrimination is likely to occur as well in decisions concerning the eviction of tenants. The experience in New York City confirms these problems. *Id.* at 62.

B. The Anticompetitive Impact Of The Ordinance Clearly And Significantly Affects Interstate Commerce.

It cannot be said that there is an insufficient basis for appellants to establish Sherman Act jurisdiction. Appellants need only allege that the local activity of rental housing has a substantial effect on interstate commerce, not the "more particularized showing" that the rent control measures have substantial effect on interstate commerce. *See Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (1982). The Sherman Act is an "affecting commerce" statute that reaches substantially as far as the "commerce clause" of the Constitution permits. Indeed, "Congress intended to extend the substantive prohibitions of the Sherman Act to the farthest reaches of its power under the Commerce Clause. . ." Sullivan, *Handbook of Antitrust Law* 709 (1976); *Gough v. Ross-Moor Corp.*, 487 F.2d 373, 375-376 (9th Cir. 1973). In determining the

full extent of commerce clause jurisdiction, this Court ruled that interstate commerce was sufficiently affected in a single extortionate credit transaction which occurred wholly within one city. *Perez v. United States*, 402 U.S. 146, 150 (1971). Since the local activity of rental housing involves many transactions, it clearly exceeds the interstate commercial effect of a single incident of extortion. Moreover, the ordinance itself contemplates a reach beyond a single incident. The ordinance indicates that the local government has undertaken to act as an insurer of adequate housing for its citizens and thus makes rent control part of the inherent enterprise function of the government. This kind of function includes such inherent activities of the government as building and maintaining bridges and roads. In these areas the government has enacted legislation pursuant to an overall plan. Here Berkeley seeks to promote health and safety goals in a widespread fashion that clearly affects interstate commerce.

Appellee seems to argue such governmental measures are purely local and isolated by confusing the arbitral function of government with the enterprise function involved here. In the arbitral function, the government is acting as a mediator between competing economic claims. Such activities contemplate isolated individual cases and are not pursuant to an overall plan. Here the city is obviously not acting as a mediator between individual economic claims. It is pursuing an overall plan that has considerable effect on interstate commerce.

At most, appellants need only allege that Berkeley's price-fixing activities be shown "as a matter of practical economics" to have a "not insubstantial effect on the interstate commerce involved." *McClain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980). It is clear that the anticompetitive effects of the ordinance previously noted have a "not insubstantial effect on interstate commerce."

Appellee contends that it is far from clear that the ordinance imposes any significant effect on interstate financing. Motion at 12. Further, it argues that even if some effect on interstate financing were shown, it is questionable whether it would constitute a significant effect on interstate commerce, when virtually all aspects of rental housing in Berkeley are purely local. *Id.* Such arguments ignore "practical economics." Moreover, it reflects a typically distorted and totally false view of rent control that prompted Nobel Prize economist Friedrich Hayek to declare "The problem of rent control is still frequently judged only in terms of its impact on landlord and tenant, so that other far-reaching repercussions on the whole economic system are largely ignored or underrated." F. Hayek, *The Repercussions of Rent Restrictions, reprinted in Rent Control: Myths & Realities* at 171.

As a "practical matter of economics", "the adverse effects of rent control spread far beyond the boundaries of municipalities." The President's Commission on Housing, *The Report of the President's Commission on Housing* 92 (1982). In fact, it is unreasonable to accept appellee's belief that in an interdependent capitalistic economy the anticompetitive effects of rent control are purely local. The sharp increase in costs, housing shortages, and housing deterioration discourages capital investments and improvements thereby directly affecting financing, construction and material industries, and the interstate flow of goods and materials. Imposition of rent control in a local area inevitably affects the interstate commerce of goods related to rental housing. When competition is reduced, sales of such goods are reduced, resulting in fewer purchases from out-of-state businesses. *See Gough*, 487 F.2d at 378.

Moreover, the ordinance directly affects the interstate movement of people and business. The reduction of mo-

bility problem cited with respect to the effect of misallocation of space also increases unemployment. Ault at 71. Because most labor markets are characterized by rapidly changing job locations, many employees find it necessary to move frequently to keep their present job or to find a new one. Any impediment to this mobility makes it more difficult to match job seekers with available positions. Those who have tenure in a rent controlled unit find it advantageous to forego employment opportunities at a distant location while continuing to search for a position which permits them to remain at their current address. Thus, unemployment rates are higher in rent-controlled areas to the extent workers behave in this fashion thereby reducing the flow of people seeking out-of-state jobs.

C. A Municipality's Participation In A Price-Fixing Scheme Without State Authority Does Not Exempt It From Antitrust Scrutiny.

Berkeley's rent control ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of California itself in its sovereign capacity, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52. Because the ordinance is not the action of the State of California it is unnecessary to apply the sovereign capacity criterion and examine the issue of "active state supervision." *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Even if this criterion were applied, the ordinance would not meet it. The State of California does not in any way supervise local rent control programs. "California has no state rent control statute." 37 Cal.3d at 655; Appendix A at A-6.

Amicus agrees with appellants that Berkeley's ordinance does not satisfy the "clear articulation and affirma-

tive expression" criterion of the state action exemption test set out in *Boulder*. However, appellee argues that the requirement of "clear articulation and affirmative expression" is fulfilled by California statutes requiring each California city to take measures to improve the housing situations of "all economic segments of the community." Motion at 15. It contends that the Legislature has contemplated that the cities themselves will decide what specific measures will best "accommodate local conditions and circumstances." *Id.* Further, appellee contends that *Lafayette* and *Boulder* require only that the Legislature "contemplate the kind of action" taken by the city.

Acceptance of appellee's contentions "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that [this Court's] precedents require." *Boulder*, 455 U.S. at 56. Here the State of California is expressly neutral with regard to rent control. It is not denied "that the California Legislature has not directly spoken on the subject of rent control, much less 'clearly articulated and affirmatively expressed' any policy favoring local ordinances such as Berkeley's." 37 Cal.3d at 714. Plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the state's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive. *Boulder*, 455 U.S. at 55. Moreover, where cities may decide what specific measures will best accommodate local conditions and circumstances, the State is clearly allowing them "to do as they please" and can hardly be contemplating the specific anticompetitive actions for which municipal liability is sought. *Id.* The State of California has not specifically authorized California cities to control rents and thus the anticompetitive effects of rent control were not contemplated. *See Town of Hallie v. City of Eau Claire*, —— U.S. ——, 53 U.S.L.W. 4418, 4421 (March 27, 1985).

D. The Ordinance Facially Conflicts With The Sherman Act And Is Thus Preempted Under The Operation Of The Supremacy Clause.

The ordinance unlawfully destroys horizontal price competition among owners of 23,000 rental units. *See Midcal*, 445 U.S. at 103. Moreover, such price control results in other serious anticompetitive effects previously noted. Thus, amicus argues that the ordinance is preempted since it restricts vigorous price competition in contravention of the pro-competition policies and goals of Section 1 of the Sherman Act (15 U.S.C. Section 1).

The Sherman Act reflects long-standing national economic policies that "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). This Court has firmly ruled that any agreement or combination which has the purpose and effect of "raising, depressing, fixing, pegging or stabilizing . . ." prices is illegal per se Under Section 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). Price is the "central nervous system of the economy," *id.* at 226, and an agreement that "interfere(s) with the setting of price by free market forces" is illegal on its face. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969). Governmentally imposed price levels facially conflict with the Sherman Act because such price-fixing activity "has long been regarded as a per se violation of the Sherman Act." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659-660 (1982).

Significantly, Congress clearly and manifestly affirmed the notion that the federal antitrust laws should supersede the police powers of municipal governments.[5] Thus,

[5] Local Government Antitrust Act of 1984, 15 U.S.C. Section 35; Public Law 98-544.

a preemptive conflict exists in the present case where the ordinance obstructs "the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

This Court has resolved such conflicts against state policies not saved by the state action exemption which compel activities that demand private conduct forbidden by the Sherman Act. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). This is especially true when as here a municipal ordinance is involved. In such conflicts with the Sherman Act, the Court has accorded municipalities less deference than states. *City of Lafayette*, 435 U.S. at 412-413. The Berkeley ordinance should be struck down.

CONCLUSION

For all the foregoing reasons, amicus submits that the decision below should be reversed.

Respectfully submitted,

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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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Appellants,

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Appellees,

On Appeal from the Supreme Court of California

BRIEF AMICUS CURIAE OF THE COALITION FOR COMPETITION IN APARTMENT RENTALS † IN SUPPORT OF APPELLANTS

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43 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	8
CONCLUSION	30
APPENDIX	1a

TABLE OF AUTHORITIES

Cases — Page

Albrecht v. *Herald Co.*, 390 U.S. 145 (1968) 17
Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) 16-17, 29
Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 9-11
Birkenfeld v. *City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976) 2-4
Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) 17
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 11-13, 15
Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980) 17
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 10-12, 15-16, 20
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982) ..... *passim*
Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) 17
Fisher v. *City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984) ..... *passim*
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 9
Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) 17
National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 17, 20, 28
New Motor Vehicle Bd. v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978) 11
Northern Pac. Ry. Co. v. *United States*, 356 U.S. 1 (1958) 17
Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 105 S. Ct. 2613 (1985) 15, 17
Parker v. *Brown*, 317 U.S. 341 (1943) ..... *passim*
Rice v. *Norman Williams Co.*, 458 U.S. 654 (1982) 12
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) 17
Southern Motor Carriers Rate Conference, Inc. v. *United States*, 105 S. Ct. 1721 (1985) 13

TABLE OF AUTHORITIES—Continued

Page

Town of Hallie v. *City of Eau Claire*, 105 S. Ct. 1713 (1985) 12-14, 24, 26-27
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 17
United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) 17
United States v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) 16

Constitutional Provisions, Statutes, and Ordinances

U.S. Const. art. I, § 8, cl. 3 ..... 4, 9, 30
U.S. Const. art. VI, cl. 2 ..... 9, 12
15 U.S.C. §§ 1 *et seq.* ..... *passim*
Local Government Antitrust Act of 1984, Pub. L. 98-544, 98 Stat. 2750, 15 U.S.C. §§ 31-36 (1984) 7, 19-22, 28-29
Cal. Const. art. XI, § 7 3
Cal. Gov't Code §§ 65300-65589 (Deering 1979 & Supp. 1985) 4
Cal. Gov't Code § 65589(b) (Deering 1979 & Supp. 1985) 4
Cal. Health & Safety Code §§ 1500-1567.9 (Deering 1979 & Supp. 1985) 6
Cal. Health & Safety Code § 1518 (Deering 1982) 6
Cal. Health & Safety Code § 50202 (Deering Supp. 1985) 6
Berkeley, Cal., Ordinance 5261-N.S. (June 3, 1980, as amended) ..... *passim*
Los Angeles, Cal., Municipal Code ch. XV (1984) 1
Santa Monica, Cal., Charter art. XVIII (1984) 1
West Hollywood, Cal., Ordinance 59 (June 27, 1985) 1

Miscellaneous

C. Baird, *Rent Control: The Perennial Folly* (1980) 23
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TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 98-965, 98th Cong., 2d Sess. (1984)	20-22, 29
Hemel, *What Does Rent Control Control?* 2 F. Taxing & Spending 83 (1979)	26
Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws,* 69 Cornell L. Rev. 604 (1984)	24
Lea, *Rent Controls as Income Distribution Policy,* 12 Real Est. Rev. 79 (1982)	23, 26
Matthews & Pappas, *Rent Control and Community Impacts,* 44 J. Prop. Mgmt. 265 (1979)	24
Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 691 (1983)	23-25
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Rent Control, A Popular Paradox (Fraser Institute ed. 1975)	23
The Report of the President's Commission on Housing (1982)	24
S. 1578, 98th Cong., 2d Sess. (1984)	19
S. Rep. No. 98-593, 98th Cong., 2d Sess. (1984)	19-20
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White, *Rent Control Threatens To Impede Lending,* Savings & Loan News, Oct. 1981, at 86	26

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INTEREST OF AMICUS CURIAE

The Coalition for Competition in Apartment Rentals is comprised of a group of 33 apartment house owners in California who own more than 17,700 units in the cities of Los Angeles, West Hollywood, and Santa Monica, California.[1] These three cities have adopted rent control ordinances which raise the same issues as the one enacted in Berkeley,[2] and therefore the members of the *amicus* Coalition have a direct financial interest in the outcome of this case. The Coalition was formed for the specific purpose of presenting its views in this case.

This brief is being filed because there are a number of matters that at least to date have not been sufficiently

[1] A copy of the Agreement instituting the Coalition is attached hereto as Appendix A.

[2] *See* Los Angeles, Cal., Municipal Code ch. XV (1984); Santa Monica, Cal., Charter art. XVIII (1984); and West Hollywood, Cal., Ordinance 59 (June 27, 1985), many of the provisions of which are far more restrictive than those in Berkeley's ordinance.

discussed by the parties and other *amici*. Among these are the extent to which the California Legislature has heretofore addressed the issue of rent control, Congress's understanding and intent in regard to the present state of the law relating to municipal exemption from the antitrust laws, the possibility that this Court might apply a standard of legality under the antitrust laws to municipalities different from the one it applies to private parties, the reason why a state Legislature might well choose to allow cities within the state to be answerable to the antitrust laws for anticompetitivc conduct, and the importance of allowing Congress and the states to determine whether, how, and to what extent traditional *per se* rules should apply to municipal price fixing.

Both Appellants and Appellees have consented to the filing of this brief.

STATEMENT OF THE CASE

With two exceptions, the statement of the case, including the way the City of Berkeley's rent control ordinance operates, has been adequately set forth by Appellants.

1. No brief to date has adequately delineated the decision below. Because the opinion by the majority of the California Supreme Court is so lengthy and convoluted, and because its reasoning is central to a resolution of this case, we explain briefly our understanding of how the court reached the result it did.

The court began with the proposition, established in one of its prior cases,[3] that although California has " 'no state rent control statute' ", cities have the general police power to enact rent control ordinances pursuant to a California constitutional provision conferring upon them the authority to enact " 'all local, police, sanitary, and other ordinances and regulations not in conflict with gen-

[3] *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

eral laws.' "[4] After then reviewing a number of this Court's decisions (*id.* at A-7 - A-12), the court below decided that it need not reach the "state action exemption principle" *unless* there was a conflict between the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and the ordinance at issue. *Id.* at A-12.

Turning to the Sherman Act, the court attempted to discern the principal justifications for the *per se* rule as applied to price fixing. It thought that these justifications were two-fold: the "economic reliability" assumption—that price fixing virtually never has redeeming features—and the "ease of administration" assumption—that it is easier for the judiciary to administer the rule on a *per se* basis than by supervising the reasonableness of prices. *Id.* at A-21 - A-26. The court concluded that neither of these justifications applies to cities. As to the "economic reliability" assumption, nothing suggested that Berkeley was acting for its "own selfish purposes with a view toward securing market control and hence price control in the future"; instead, Berkeley's *purpose* was to serve the public welfare. *Id.* at A-23. As to the "ease of administration" assumption, the court concluded that the burden of administering rent controls would be borne by the city rather than the courts, and, in any event, the burden was outweighed by the legitimate use of the city's police power. *Id.* at A-23 - A-26.

Turning to the Rule of Reason, the court used essentially the same reasoning it had applied to the *per se* rule: whereas private business is motivated by the prospect of increased profits, cities are motivated by the promotion of the public welfare. Cities are therefore different, a different rule should apply to them, and the Rule of Reason is not applicable. *Id.* at A-26 - A-28.

Having thus rejected the principles established by this Court for the application of the Sherman Act, the California court developed its own, entirely different, stand-

[4] Appendix to Jurisdictional Statement ("JS App.") A-6, quoting *Birkenfeld*, 17 Cal. 3d at 141, and Cal. Const. art. XI, § 7.

ard for testing whether the Berkeley ordinance was consistent with the Sherman Act. The test it evolved, purportedly based in part on this Court's decisions under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, was whether the municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even-handed manner. If the ordinance meets this test, it must be upheld unless the plaintiff can demonstrate that the city's purposes "could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies." *Id.* at A-31; footnote deleted. How this could be proven was not explained (see particularly *id.* at A-31 n.28). Since Berkeley's ordinance has beneficial purposes, and no one had demonstrated that it failed to operate in an even-handed manner, it was consistent with federal antitrust policies. Accordingly, the antitrust issue was finally disposed of in these terms: "Because we determine that plaintiffs have not established a conflict with the [Sherman] Act, we do not address whether the ordinance may be exempt from antitrust scrutiny under *Boulder*." *Id.* at A-35. The California court then proceeded to consider what it terms "Rent Control Issues", such as the adequacy of the procedure for rent adjustments. Thus, it never considered the applicability of the Sherman Act to the Berkeley ordinance, and the decision was based entirely on a revision of federal antitrust standards.

2. Only one other factual point need be clarified. As noted above, the majority below conceded that California has " 'no state rent control statute' " (JS App. A-6, quoting *Birkenfeld*, 17 Cal. 3d at 141), and the dissent pointed out: "It is uncontradicted that the California Legislature has not directly spoken on the subject of rent control, much less 'clearly articulated and affirmatively expressed' any policy favoring local ordinances such as Berkeley's." JS App. A-82. In point of fact, however, California has spoken about rent controls, and in a decidedly negative fashion.

The California Planning and Zoning Law, in §§ 65300-65589, sets forth a comprehensive housing scheme, the intent of which is to facilitate the improvement and development of housing and at the same time place primary responsibility for this goal on local counties and cities (§§ 65300, 65580, 65581). Each chartered city, for example, is directed to adopt a plan for its physical development containing the housing elements established by the Legislature (§ 65300). The program envisages five-year schedules of action, the identification of sites for emergency housing, the promotion of housing opportunities for every one regardless of race, religion, and sex, the provision of housing affordable to low- and moderate-income households, and the like. But this comprehensive plan also contains this key provision (§ 65589(b)):

> Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

Similarly, the California Housing and Home Finance Act, part of the state's Health and Safety Code, was enacted to address the statewide housing problems faced by households of low and moderate income. The Act assigns principal responsibility for coordinating federal-state housing programs to the California Department of Housing and Community Development ("Department"), and responsibility for providing financing assistance to housing developments for persons and families of low or moderate incomes to California's Housing Finance Agency ("Agency"). Qualified individuals, groups, or business entities, denominated as "housing sponsors" by the Act, may seek authority from the Department or the Agency to construct, acquire, or rehabilitate housing developments within the state. Qualified individuals may also seek "housing sponsor" status in order to obtain property improvement loans. Housing sponsors who receive financial assistance from the Department or the Agency must enter into "regulatory contracts" to ensure that the requirements of the Act will be satisfied.

A key section of the Act, § 50202, addresses the issue of rent controls:

> Nothing in this division shall authorize the imposition of rent regulations or controls except by a regulatory contract between the agency or the department, as the case may be, and its housing sponsor or developer, for housing units financed, insured, coinsured or otherwise assisted by the agency or by the department, as the case may be. Except for the federal government, the right to control rent on such units shall reside exclusively in the agency or the department, as the case may be, and the housing sponsor or developer so regulated shall not otherwise be subject to controls on rent imposed by any state or local agency or other local public entity.

Finally, the California Legislature has addressed the subject of rent controls in the California Community Care Facilities Act, Cal. Health & Safety Code §§ 1500-1567.9 (Deering 1982 & Supp. 1985). That Act establishes a statewide service system of community care for mentally ill and developmentally and physically disabled children and adults. These goals are to be reached primarily through stringent licensing requirements and continuing supervision by state authorities. Among the provisions of the Act is the following directive addressing rent controls:

> § 1518.
>
> (a) Nothing in this chapter shall authorize the imposition of rent regulations or controls for licensed community care facilities.
>
> (b) Licensed community care facilities shall not be subject to controls on rent imposed by any state or local agency or other local government or entity.

Thus, while it may well be, as the majority below observed, that the California Constitution allows, or at least does not prohibit, the municipal imposition of rent controls, the message of the Legislature, to the extent it has spoken on the subject, has been entirely negative. Rather than directing, condoning, encouraging, supervising, adopting or enforcing the imposition of rent controls, the state itself has, in every case where it foresaw that municipal controls would be imposed in relation to specific programs or projects, prohibited their imposition. There is *no* provision in any statute in the state approving the enactment of rent controls by any county, city or agency.

SUMMARY OF ARGUMENT

Under the state action doctrine formulated by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), states are exempted from antitrust liability. Private parties who are compelled to violate the antitrust laws by clearly articulated and affirmatively expressed state policies are also exempted when they are actively supervised by the state. Municipalities are themselves exempted when there exists a clearly articulated and affirmatively expressed state policy covering the municipal conduct in question.

In the present case, the City of Berkeley has directed private parties to charge no more than fixed sums for rentals to tenants—conduct that, if undertaken by private parties acting alone but in concert, would clearly be violative of the Sherman Act under the *per se* rule. Because the State of California not only has failed to adopt a clearly articulated and affirmatively expressed policy allowing rent control, but has expressed a negative attitude toward such controls, and because there is no active *state* supervision and implementation of Berkeley's rent control ordinance, the ordinance should be invalidated on the basis of this Court's existing precedent.

In considering the legislation that ultimately was enacted as the Local Government Antitrust Act of 1984, Congress deliberately changed the substantive antitrust law as applied to municipalities and private parties acting at a municipality's express direction. Although it immunized municipalities from awards of civil damages in antitrust cases, it *rejected* all attempts to exempt cities from antitrust injunctive relief under existing standards, as well as attempts to impose on them only a Rule of Reason approach. Thus, this Court is the beneficiary of re-

cent congressional action demonstrating that Congress has considered and rejected such changes in the status of municipalities under the antitrust laws.

Even if the Court were to adopt a Rule of Reason-type approach to cities, on the theory that a city asserts public interest considerations not present in private price-fixing cases, those considerations would be outweighed in this case by the many anticompetitive aspects of rent controls. However, the Court should not adopt such a modified antitrust approach to cities, not only because Congress has rejected it, but because the states themselves can easily protect municipalities from any antitrust liability by adopting clearly articulated state policies addressing the conduct to be regulated and by instituting a program of active supervision of the private party "actors." There are many reasons (supported by virtually all economists) why a state might conclude that rent controls are not in the best interest of its citizens, and California is one of those that has chosen not to extend any exemption to cities within its borders. That being so, this Court should assume that the California Legislature intends cities like Berkeley to be subject to normal antitrust prohibitions—in this case, the *per se* rule.

In any event, the test articulated by the California Supreme Court in an attempt to circumvent the federal antitrust laws is wholly unworkable, raises more questions than it answers, and would enmesh both federal and state courts in a legal quagmire.

ARGUMENT

We submit that the California Supreme Court was plainly wrong in jettisoning almost a century worth of case law interpreting the antitrust laws and instead developing a test so broad that any municipal regulation rationally related to any legitimate goal with any sort of means-end fit will withstand judicial scrutiny. We recognize that this Court may be seeking some kind of formulation applicable to cities that stops short of outright application of a *per se* rule. But, as we show below, Con-

gress has demonstrated as recently as last year that it fully understands the current state of the law as it relates to cities, and it has deliberately chosen *not* to immunize them from injunctive relief but rather only to insulate them from civil damages. We also show that each state by now knows how to grant an antitrust exemption to the cities within its borders, and we list some of the many reasons why a state might choose not to do so. California is one of those states that has not sanctioned the type of anticompetitive activity at issue in this case. Therefore, we respectfully submit that if anything other than a *per se* application of the antitrust law is to be applied to the price fixing engaged in by cities such as Berkeley, that choice should be made either by Congress exercising its power under the Commerce Clause, or by state Legislatures exercising their powers consistent with the Supremacy Clause, U.S. Const. art. VI, cl. 2,—all acting within the guidelines already laid down by this Court.

To establish a factual context for these points, we first review briefly relevant portions of the principal cases treating the so-called "state exemption" doctrine.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), the Court established the general proposition that anticompetitive action carried out by the state *itself* is exempted from coverage by the federal antitrust laws.

In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the Court held a minimum-fee schedule enforced by a state Bar in violation of the Sherman Act. Because there was no state law *requiring* the anticompetitive activities, the minimum-fee schedule did not come within the *Parker* v. *Brown* exemption, even though the state Supreme Court's ethical codes mentioned advisory fee schedules. "[A]nticompetitive activities must be compelled by direction of the State acting as a sovereign" before they are exempt. *Id.* at 791.

However, the Court in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), held that an otherwise impermissi-

ble ban on lawyer advertising imposed by the Arizona Supreme Court came under the *Parker* v. *Brown* doctrine because the court was a state agency and the restraint was thus compelled by the state. The state policy was (a) clearly articulated and affirmatively expressed as state policy and (b) actively supervised by the state agency.

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a majority held that the Sherman Act applies to cities, as opposed to states, and a plurality concluded that the *Parker* v. *Brown* protection accorded to *states* does not apply to *cities* which themselves violate the antitrust laws unless they are acting pursuant to state policy in displacing competition with regulation or monopoly public service. There must be evidence, said the plurality, that the state "authorized or directed" the city to act as it did. *Id.* at 414. It would appear, in other words, that the plurality took one part of the two-part test applied to a state agency in *Bates* and made it applicable to cities which were themselves the antitrust violators. In a footnote, however, the plurality said that "[i]t *may be* that certain activities which *might appear* anticompetitive when *engaged in* by private parties, take on a different complexion when *adopted* by a local government." *Id.* at 417 n.48; emphasis added.[5]

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[5] The plurality cited a law review article as a basis for this suggestion. However, the article, which of course was written before all of this Court's post-*Lafayette* decisions, was essentially a tract *against* the expansion of the state exemption. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693 (1974). For example:

> This article begins from the position that, absent persuasive reasons to the contrary, state regulation should be invalidated whenever it achieves results which, privately arranged, would violate the antitrust laws. * * *
>
> * * * *
>
> Moreover, this article advocates a narrow reading of the federalism justification. This justification depends on supposed congressional intent not to interfere lightly with important state interests. The necessary congressional intent should be

New Motor Vehicle Bd. v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), dealt with a state statute setting up a regulatory scheme which allegedly initiated restraints on trade. The Court applied *Parker* v. *Brown* because the statute "clearly articulated and affirmatively expressed" an intent to displace unfettered business freedom. *Id.* at 109. However, in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which also dealt with a state statute, the Court held that *Parker* v. *Brown* did not apply because the state, although clearly articulating and affirmatively expressing a state policy of price setting through resale price maintenance, did not actively supervise that policy. The Court interpreted *Lafayette* as having adopted both parts of the *Bates* test (*id.* at 105), and it said that while the state authorized price setting and enforced prices effectuated by private parties, it did not establish the prices themselves, review their reasonableness, regulate their terms, or monitor them. *Id.* at 105-106.

In a case similar in some respects to the instant one, *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), the Court held that *Parker* v. *Brown* did not exempt from antitrust scrutiny a municipal ordinance allegedly restricting a cable television company from expanding its business. This was because there was only a general "home rule" delegation of powers to Colorado cities and not the "clear articulation and affirmative expression" of specific state policy that was required. As to the restrictions under scrutiny, the state's position was

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> inferred in only two situations. The first is public utility regulation of traditionally regulated industries. The second is state economic regulation which can find some recognition or support in federal legislation outside the antitrust areas. [*Id.* at 703, 709.]

Significantly, in discussing the Fourth Circuit's opinion in *Goldfarb*, the author stated: "This approach should be rejected. If followed, it could be used to justify any economic regulation so long as it can be tacked on to health and safety regulation." *Id.* at 714.

The same reasoning, of course, applies in this case.

one of "mere *neutrality*". *Id.* at 55; emphasis in original. The Court reserved the question of whether the ordinance at issue also must or could satisfy *Midcal*'s active supervision test. *Id.* at 51-52 n.14. As in *Lafayette*, the Court in a footnote also reserved the issue of whether " 'certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government.' " *Id.* at 56-57 n.20, quoting *Lafayette*, 435 U.S. at 417 n.48.

In *Rice* v. *Norman Williams Co.*, 458 U.S. 654 (1982), the Court established the rule that a state statute is preempted by the Sherman Act only when it mandates or authorizes private conduct that *necessarily* constitutes an antitrust violation in all cases, or places an irresistable pressure on private parties to commit antitrust violations. *Id.* at 661. Such is the case when the conduct enforced by the statute would be a *per se* violation of the Sherman Act (*id.*), which it was not in that case. Thus, *Midcal*, a *per se* case, was distinguished. *Id.* at 659-660. Significantly, the Court noted that "[i]t is not surprising * * * that a statute which requires practices *per se* illegal under the Sherman Act may be subject to a facial challenge under the Supremacy Clause." *Id.* at 659-660 n.5.

In *Town of Hallie* v. *City of Eau Claire*, 105 S. Ct. 1713 (1985), a tying case, the state statute declared a "clearly articulated and affirmatively expressed" policy to displace competition with regulation in the area of sewage collection by cities. *Id.* at 1717-1720. The Court applied *Parker* v. *Brown* and ruled that when the "actor" is the city itself rather than a private party, active state supervision is not necessary in order to obtain exemption from the antitrust laws. *Id.* at 1720. In other words, the Court held that the second prong of the *Midcal* test was not applicable to a city acting pursuant to state policy when it directly restrains competition.

The Court pointed out that whereas a private party may act only to further his own interests, there is little danger that a city *following state policy* will do so. The

Court, however, was careful to note one of the dangers of a city *not* following state policy: "it will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.* at 1721. The Court added this somewhat enigmatic footnote to its opinion: "In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue. Where state or municipal regulation of a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists." *Id.* at 1720 n.10.

Finally, in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 105 S. Ct. 1721 (1985), decided the same day, the Court dealt with common carriers submitting joint rate proposals to state agencies. Each of the states involved allowed such carriers to submit joint rates, although the carriers were free to submit individual rates. The Court applied *Parker* v. *Brown* and the two-part test of *Midcal*—a clearly articulated state policy and active state supervision. Since the states had sufficiently indicated their intention "to displace competition in a particular field with a regulatory structure" (*id.* at 1731), and state agencies actively supervised the joint rates, the private parties were immune from antitrust liability. The Court emphasized, however, that the joint rate policy had been "approved", or "clearly sanctioned", by each state legislature (*id.*), even though one state had not specifically referred to joint rates.

While, by the Court's own admission, its opinions in this area have not always been consistent in every respect, the following generalizations appear to be warranted from the cases outlined above:

Where a state itself violates an antitrust law, or clearly articulates and affirmatively expresses a policy which compels private parties to violate the antitrust

laws, there is complete immunity.[6] When private parties are regulated by a state agency in a way which violates the antitrust laws, they are immune only so long as the agency is acting pursuant to clearly sanctioned state policy *and* the agency is actively supervising the private parties. When a city itself violates an antitrust law, it receives immunity only where it has acted pursuant to a clearly articulated and affirmatively expressed state policy, but there need be no active state supervision of its conduct. However, where a city directs the activities of private parties in a way that violates the antitrust laws, there is no immunity unless the conduct is carried out pursuant to clearly articulated and affirmatively expressed state policy *and* is actively supervised by the state. The instant case is covered by this last principle.

As noted above, *Town of Hallie* in a footnote set forth the "actor" standard, differentiating between cases where the city is the actor as opposed to those where private parties are the actors. It should make no difference in this case whether the city is regarded as the "actor" or whether the city is regulating private parties who themselves are the "actors", because in any event there is no "clearly articulated and affirmatively expressed" state policy that was being followed.[7] But the fact is that under this Court's formulation, Berkeley was not the "actor" (as it would be, for example, where it owned

[6] For ease of discussion, we use the term "immunity" to encompass the "exemption" and "preemption" standards articulated by the Court in its various opinions. *See Boulder*, 455 U.S. at 60-71 (Rehnquist, J., dissenting).

[7] The reason there is a measure of confusion on this point of who is the actor is that in *Boulder*, the Court treated the city as the actor and reserved the question of what rule would apply where private parties acted under the aegis of municipal regulation, and yet the city's anticompetitive action in that case was in restricting the expansion of a private company. In both that case and this one, it would appear that the antitrust offense occurred when the city compelled private parties to act, or prevented them from acting, in a way in which they wished to act and which would have allowed free market forces to operate.

all apartment units in the city and itself imposed and enforced uniform rentals). That being so, an added element is necessary in this case to legitimize the city's conduct: active state supervision. No matter how the posture of California law in regard to rent controls is characterized, no one can claim that the state of California actively "supervises" those controls.

Moreover, this case would clearly appear to be governed by the rationale of *Midcal*. In that case even a statute which clearly articulated and affirmatively expressed a price-setting state policy was found not to warrant *Parker* v. *Brown* exemption because the state failed to supervise the resulting prices. If a state itself cannot immunize price fixing without something more than an intent to do so, surely a city cannot. And here, of course, even the intent of the state is missing.

Despite these indicia that the instant case is covered by doctrine already put in place by the Court, we turn to the suggestion in the footnotes in *Lafayette* and *Boulder* that an issue akin to the one in dispute here may still be open.[8]

First, we note that by the use of the word "may be", the Court itself appears not to have been certain that the situation it was outlining (anticompetitive conduct by private parties adopted by local governments) should be treated any differently than that in which cities themselves act in an anticompetitive manner. Secondly, the Court described activities by private parties as those that "might appear" anticompetitive. Unlike the group boycott situation, where confusion reigns as to the proper application of the law,[9] there can be no uncertainty about whether the activities in the present case are anticompetitive. There is no clearer anticompetitive

[8] "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."

[9] *See Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2619 (1985).

activity in the law than price fixing. Finally, the *Lafayette* and *Boulder* footnotes speak of activities "engaged in" by private parties which are "adopted" by a local government. That does not describe this case, for here the city imposed anticompetitive regulation on landlords against their will. The landlords did not seek to defend their activity on the ground that it was carried out pursuant to municipal policy, which in turn was adopted pursuant to state policy—the situation that we believe the Court had in mind in its footnotes. Instead, the city regulated in a way which the landlords sought to avoid.

Nevertheless, because the Court has raised a question as to whether there should be differing standards when cities are involved, we turn now to why Berkeley should not be allowed, on this record, to set a ceiling on prices in apartment rentals.

As noted above, the California Supreme Court, in rejecting the *per se* approach to the Berkeley ordinance, focused upon two of the justifications noted by this Court for the *per se* rule—that price fixing virtually never has redeeming features and that the rule is easier for courts to administer. Aside from the fact that the lower court greatly over-simplified this Court's rulings and the situation that will develop out of its own formulation,[10] it totally ignored the overriding justification for the *per se* rule as applied to price fixing—the pernicious *effects* of such a practice, as pointed to by this Court time and again.

In a long line of cases, the Court has made clear that Congress concluded in the Sherman Act that price fixing restricts and curtails normal competitive forces and the free play of the market, and that these forces, combined

[10] For example, the court correctly pointed out that Berkeley's rent control scheme is supervised by the city's Rent Stabilization Board, but then failed to give any meaningful consideration to the judicial costs of assessing the reasonableness of the Board's decisions in individual cases. *See, e.g., Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343-344 (1982), and *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331-332 (1897).

with free market play, produce on their own the most beneficial results for society as a whole. That is why a price fixer need not have monopoly power in order to violate the *per se* rule, and why neither a purpose nor the power to fix prices is necessary to make out a violation. It is why no overt act need be shown, why co-conspirators need not have available the means to carry out their price fixing, and why only a small part of commerce need be embraced in such a conspiracy. It is why it is irrelevant that only a price floor or ceiling is established and that the resulting prices actually fluctuate. It is why it makes no difference that the fixed prices are reasonable, that the price fixers have laudable objectives, or that the prices that are fixed produce beneficial results.[11]

Fixed prices are banned "because of their actual or potential threat to the central nervous system of the economy". *Socony-Vacuum Oil Co.*, 310 U.S. at 224-226 n.59. The decision to apply the *per se* rule turns on "'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output * * *.'" [12] And "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Id.* at 222.

[11] *E.g., United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-223 (1940); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951); *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 151-154 (1968); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 609-610 (1972); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 689 (1978); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647-650 (1980); *Maricopa County Medical Society*, 457 U.S. at 348-354.

[12] *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 105 S. Ct. at 2617, quoting *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

Thus, virtually all of the reasoning of the majority below runs directly counter to *per se* principles. Even though competition is restrained and output decreased, the California majority has focused on the intent, purpose, and objectives of the price fixers, and emphasized the flexibility of the fixed prices. It has substituted its judgment for that of Congress.

Appellees would have the Court now carve out an exception to the uniform *per se* rule even though the state has not articulated an affirmative policy toward rent control, and the effect of Berkeley's ordinance is to establish a ceiling on rents throughout the entire city. But the *effects* of the Berkeley ordinance are at least as harmful here as they would be in a case where prices are pegged to a particular level. As a matter of fact, the rent controls in this case are *more* pernicious than in the ordinary private-party price-fixing case, because (a) every landlord in the city is affected, whereas in many cases only a handful of competitors engage in the conspiracy; (b) municipal controls are more static and inflexible than in circumstances where competitors can easily change their joint positions; (c) individual competitors are not bound to their agreement by law but can deviate in price at will, whereas the controls applied here are enforced by the courts; and (d) in the ordinary case, at least the conspirators are acting in their own perceived self-interest in the market place, whereas here every competitor is acting against his will, and no market factors are brought into play at all. No amount of word-juggling can avoid the fact that the control of prices is *economic* regulation—not, as the California Supreme Court said, health and safety regulation [13]—and yet all available economic forces are suppressed.

There is no denying that the Court has moved toward a more liberal policy since its *Parker* v. *Brown* decision 43 years ago. The states are allowed greater leeway than originally anticipated in condoning municipal prac-

[13] *See* Posner, *supra* note 5, at 717.

tices, as well as practices by private parties, which unless exempted would clearly violate both the letter and the spirit of the antitrust laws. What the Court seems to be seeking is a middle ground which will allow the states the ability, without ritual incantation, to experiment with controlled or partially controlled economies through regulation, and at the same time not unduly encroach upon a congressionally-established free market system in interstate commerce. Nevertheless, limits have been imposed on this freedom, and for good reason.

There are two principal dangers in relaxing the standards of *Parker* v. *Brown* and its progeny beyond the point to which they have already been taken.

1. The Court appears to have assumed, since Congress has not reacted adversely to its decisions, that a relaxed standard is in accord with congressional wishes—that Congress has *intended* for the antitrust laws to stop short of curtailing certain state-endorsed public and private action. But as the Local Government Antitrust Act of 1984 [14] demonstrates, there are definite limits to this congressional intent, and one of them involves the very issue in this case: the exercise by *cities*, under the guise of state sanction, of a power which would be impermissible under the antitrust laws and which in fact has not been sanctioned or approved by the state. The legislative history of that Act is highly relevant for two reasons: It shows Congress's 1984 understanding of the state of the law, and it demonstrates that Congress does *not* intend for cities to take on the mantle of state authority without express direction by the state itself.

The Senate Bill, S. 1578, as originally introduced, would have provided that "The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city * * * in the exercise of its regulatory powers * * * where such law or action is valid under State law * * *." *See* S. Rep. No. 98-593,

[14] Pub. L. 98-544, 98 Stat. 2750, 15 U.S.C. §§ 31-36, enacted October 24, 1984.

98th Cong., 2d Sess. 4 (1984). In other words, this Bill, as the Senate Judiciary Committee specifically noted (*id.* at 5), would have overturned *Lafayette* and *Boulder*. It would have immunized from antitrust attack the type of ordinance enacted by Berkeley, which is not in violation of the general laws of the state but which has not been approved by the state Legislature. That Bill was changed in Committee, however, so as not to address "the basic application of the antitrust laws to local governments; *Lafayette* and *Boulder* remain unchanged." *Id.* Instead, the Senate Bill made cities immune from civil damages where the local law was "valid under State law." *Id.* at 4.

In the House, a number of Bills were introduced. One would have given antitrust immunity to local governments based either on the nature of the municipal activity or on state "authorization" of the local conduct. H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 13 (1984). Another would have applied a "rule of reason test" to municipalities, along the lines of one suggested by Professor Thomas Campbell.[15] Still another would have created a "municipal rule of reason test slightly different from the one suggested by Professor Campbell. H.R. 5992 would establish a jurisdictional test in which the antitrust laws would not apply to official conduct of a local government 'reasonably undertaken to protect or provide for the public health, safety or welfare.' This standard offers local governments broad protection, but stops short of absolute immunity." *Id.* at 17.

Some of the bills, however, did propose "to put municipalities back in a pre-*Boulder* position by attempting to provide them with the same immunity currently enjoyed by States." *Id.* at 14. The House Judiciary Committee received testimony favoring such immunity, but it

[15] *Id.* "Professor Thomas Campbell suggested that the Subcommittee consider 'legislatively overruling' the *Society of Professional Engineers* case as it relates to units of local and State government by developing a 'municipal rule' of reason test based on a 'less restrictive alternative' analysis." H.R. Rep. No. 98-965 at 16; footnote deleted.

also heard that "immunizing local government units from the antitrust laws would create very strong incentives for the establishment of additional local boards and commissions to set fees, prices, or rates and to establish location, customer or other restrictions in various professions and industries." *Id.* at 9. The Committee felt that "[a]ny legislative solution * * * should weigh the chilling effect of potential or actual antitrust litigation on local governments and their officials against the need to preserve some right of redress for private persons (including consumers) harmed by anticompetitive conduct." *Id.* at 12-13. The Committee recognized that "*Parker* v. *Brown* carries with it the admonition that a State may not immunize private conduct which is violative of the antitrust laws simply by authorizing it" (*id.* at 11), and it repeatedly pointed out that cities *are* subject to antitrust liability under current law unless directed by states to take anticompetitive action. *E.g.*, *id.* at 2, 6-7, 10, 11, 14.

All of the Bills granting antitrust immunity to cities or adopting a Rule of Reason approach were rejected. The Committee's reasoning in doing so is instructive:

> If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time. The record does support, however, the notion that municipalities—and their taxpayers who must ultimately shoulder the burden—should not be subject to punitive sanctions in the form of treble damages.
>
> * * * *
>
> The Subcommittee was persuaded * * * that the most balanced legislative response at this time would be to restrict private remedies to injunctive relief. * * *
>
> * * * *
>
> For private plaintiffs, this approach ensures a right of redress through the summary proceeding of

> injunctive relief. * * * Equally important, this remedy approach in no way precludes private plaintiffs from bringing alternative claims that are available and that might afford restitution in money damages for economic harm suffered. [*Id.* at 18-19; footnote deleted.]

In the approved Bill (H.R. 6027), the Committee did provide immunity from *damages* that was broader than that accorded by *Boulder*, in an effort to cover every situation that might develop (*id.* at 20-21), but no immunity from injunctive relief was given at all. As the Committee said, if a plaintiff "has filed suit for injunctive relief under Section 16 of the Clayton Act, that claim would be unaffected by this legislation, which applies only to damage suits pursuant to Section 4, 4A and 4C." *Id.* at 22.

The Conference Committee adopted a compromise Bill which, for the reasons outlined in the House Report, did not grant cities any exemption from the antitrust laws except immunity from civil damages. It made several technical changes in H.R. 6027 not pertinent here, but it also made one significant change in language. The Committee borrowed the phrase, "official action directed by" from *Parker* v. *Brown* and said it intended "that *Parker* and subsequent cases interpreting it shall apply by analogy to the conduct of a local government in directing the actions of non-governmental parties, as if the local government were a state." H.R. Conf. Rep. No. 98-1158, 98th Cong., 2d Sess. 3 (1984). In other words, for private parties to receive immunity, they had to have been "directed" to act as they did by local government *just as the local government had been directed to act by the state.*

The Act itself and its legislative history thus leave no doubt that Congress recognizes and approves the limits the Court has placed on cities in carrying out anticompetitive acts. It has specifically rejected an exclusion of cities from antitrust laws where they are simply acting without violating state law, and it has likewise rejected

a Rule of Reason approach to such cities. For this Court, at this time, to impose a new, liberalized test applicable to cities—either by way of a less restrictive requirement for direction by the state, or by way of a Rule of Reason approach—would move antitrust exemptions beyond the point that Congress wishes them to go.

2. The other danger in relaxing municipal exemption relates to the states themselves. The Court should be very sensitive to the fact that states now know precisely how to exempt cities from antitrust litigation and can easily supply the necessary directive that will accomplish this task. By clearly articulating and expressly approving the anticompetitive conduct at issue and providing for its active supervision, the state automatically exempts its cities under this Court's decisions. If the state has not done so, it should be assumed that there is a reason. There are, in fact, a variety of reasons why a state may not wish to grant such blanket immunity,[16] and for the Court itself to supply the immunity may therefore run directly counter to the intent of the state Legislature. In what would appear on the surface to be an act of deference to states and local governments, the Court would actually be creating state law in defiance of the legislative process in the states.

One of the many reasons why a state might prefer not to grant blanket authority is that contiguous cities—one with rent control and the other without—could unwit-

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[16] These factors are among the reasons why, as the dissent below noted, economists are virtually unanimous in condemning rent control laws. *E.g.*, C. Baird, *Rent Control: The Perennial Folly*, 54-78 (1980); *Rent Control, A Popular Paradox* (Fraser Institute ed. 1975); Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691 (1983); Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517 (1984); Lea, *Rent Controls as Income Distribution Policy*, 12 Real Est. Rev. 79 (1982); Navarro, *Rent Control in Cambridge, Mass.*, 78 Pub. Interest 83, 90 (1985) ("On the subject of rent control, the economics profession has reached a rare consensus: Rent control creates many more problems than it solves").

tingly damage the housing market to the disadvantage of consumers in both cities. Renters would flock to the rent-control city, and builders to the control-free city, so that an imbalance would be established having nothing to do with the free flow of competition. These contiguous cities, therefore, would be carrying forward the kinds of "purely parochial public interests at the expense of more overriding state goals" to which the Court referred in *Town of Hallie*, 105 S. Ct. at 1721.

There are additional problems with rent controls. In the short-term, as inflation drives up wages and other prices, rental prices (and therefore rental income) fall behind. Rental units thus become cheaper in comparison to other living quarters. Demand for rental units increases in two ways. First, those already in rental units tend to remain longer than they otherwise would because the units become progressively cheaper in comparison to other prices. Second, consumers who would otherwise be looking for homes look instead for rental units because of the lower prices. A rental space shortage thus develops. Muth, *supra* note 16, at 694-695. Additionally, the effects of the artificially low rental prices will ripple through the home construction and finance industries, as *amici* have demonstrated in their briefs in support of Appellants' Jurisdictional Statement.[17]

The long-term effects of municipal rent control are even more serious. As demand for rental units increases because of the artificially maintained rental price, the supply of units drops because owners find it much less profitable to rent them. Where possible, owners are forced to

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[17] *See also The Report of the President's Commission On Housing* 91-94 (1982) (rent control represents one of the most severe threats to housing production); Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 Cornell L. Rev. 604, 609-610 (1984).

As to how rent control causes a significant adverse impact on the property tax burden in a community, see an article by a professor of quantitative methods and a professor of finance, Matthews and Pappas, *Rent Control and Community Impacts*, 44 J. Prop. Mgmt. 265 (1979).

convert the units to condominiums, thus displacing families who cannot afford the purchase prices. If conversion is not possible or feasible, owners are still forced to seek ways in which to ameliorate the effects of rent control.

> Owners do so by gradually withdrawing their capital from the dwellings they own by not making repairs, let alone improvements, in these dwellings. As landlords do so, the effective or quality-adjusted size of rental housing stock tends to decline over time, thus worsening the housing shortage. Not only are more households seeking rental accommodation of a given quality level, but the stock of higher quality rented dwellings tends to decline. Exacerbating the problem, the number of potential renters increases as the city's population grows, while the potential returns to investment in new rental units continues to decline. Even if new units may be exempt from controls, potential investors in rented property may fear that new units will subsequently be made subject to controls, the actual experience in New York City. On both scores—the deterioration of the existing rental stock and the failure to add to it—the long-term effects are far more serious than the initial impact of rent control. [Muth, *supra* note 16, at 695-696.]

As pointed out in the Bay Area Council's Report, *Rental Housing in California: Obstacles & Opportunities* (*see* Appendix H to Appellant's Jurisdictional Statement), in many rent-control areas, "market rent levels have been too low to cover the costs of permanent development financing, particularly in the first year or two after project completion." JS App. A-141. A survey has demonstrated that "[l]enders perceive rent control as being by far the greatest disincentive to investment in the California rental market, and a large majority believe all communities in the state are affected, including those without rent control ordinances." *Id.* at A-142.

Thus, rent controls cause "haphazard and arbitrary allocation of space", create an indefinite continuance of rent ceilings, force the subsidization of new construction, re-

strain the ability of landlords "to sell housing in accordance with their own best judgment exercised in light of market conditions," and discourage or prevent landlords from furnishing services or facilities considered desirable or necessary by their tenants. *Fisher*, JS App. A-83-A-84 (Lucas, J., dissenting). A number of economists have even refuted the commonly-held view that rent control necessarily benefits the poor and minorities. As one of them put it, "rent control is an extremely inefficient and inequitable method of income redistribution." [18]

We point out these factors not as part of a plea against rent controls—because it is not for this Court to judge their efficacy one way or another in the context of this suit—but rather to point out that there are many reasons why states may not wish to direct cities to impose such controls. For this Court to assume that, merely because a state has not forbidden rent controls, it has necessarily embraced them and passed along its power under the Supremacy Clause to municipalities within the state is a very long step indeed—virtually a leap of faith—and one that is both legislative in nature and contrary to fact.

As noted in our Statement of the Case, the State of California has spoken negatively of rent controls. While the state Supreme Court has held that the state Constitution *allows* cities to enact rent control ordinances, what the court is alluding to is merely a general provision permitting cities to exercise their normal police powers and to act for the public welfare. Rent control is nowhere referred to in the state Constitution.

This case is thus a far stronger one against exemption than either *Boulder* or *Town of Hallie*. In *Boulder* the state statute did not address the problem in the case at all; there was merely a general "home rule" delegation

[18] Lea, *supra* note 16, at 82; *see also* Navarro, *supra* note 16, at 97-99. For an explanation of this thesis, see Hemel, *What Does Rent Control Control?*, 2 F. Taxing & Spending 83 (1979). A non-economist has also made the same case. White, *Rent Control Threatens to Impede Spending*, Savings & Loan News, Oct. 1981, at 86, 87.

of power. The city ordinance was therefore struck down because it did not constitute state action. In *Town of Hallie*, the state statute addressed the problem involved there, and specifically allowed action which in turn contemplated the anticompetitive acts. Therefore, the city ordinance was upheld as exempted state action.

Here, no state statute adopts or approves rent controls, and in the instances in which the state has addressed the problem at all, its voice has been one of disapproval. The only way the state could have expressed itself in stronger terms is if it had specifically *prohibited* municipal rent controls in all instances. Since the state is not merely neutral but negative in its attitude toward such controls, there can be no exemption through state action.

Of course, this Court could reject a *per se* approach to the price fixing in this case and, because a city is involved, revert to the Rule of Reason on the theory that the mere assertion of public interest factors takes the conduct out of the more stringent *per se* test. The theory, presumably, would not be one of exemption but simply that a city, asserting the interests of its citizens, necessarily presents factors that should be weighed in the competitive balance. However, such an approach would conflict with congressional intent, as outlined above, and would present enormous difficulties for both plaintiffs [19] and the courts. Added to all of the factors which already must be weighed would be the nature and extent of the asserted public interest and its relative weight in the balance. Nevertheless, because of the problems with rent controls we have already enumerated, it seems clear that in this case no amount of rationalization by the city could offset the counterbalancing, anticompetitive aspects of such controls. Both the short- and long-term effects of

[19] *See* Spiegel, *Local Governments and the Terror of Antitrust*, 69 A.B.A. J. 163, 165 (1983) ("In situations in which the rule of reason defense is expanded to encompass a public interest rationale, this would place a Protean and virtually insurmountable burden on plaintiffs").

rent control adversely impact both the availability and quality of rental housing, and the ripple effects through the housing and finance industries and the consequences on interstate commerce are demonstrably adverse.

Moreover, considering public interest-type factors would run directly counter to prior decisions of this Court. Far more compelling reasons than the ones submitted by the court below have heretofore been rejected as justifications for otherwise illegal conduct under the Rule of Reason. In *National Society of Professional Engineers*, for example, the defendant presented evidence not merely of a good purpose but of danger to the public and actual failures and disasters resulting from the competitive practices against which the assailed rule in that case was directed. Although the Court applied the *per se* rule, it stated that "public interest" factors were not relevant under the Rule of Reason. The justification, said the Court, must relate to competitive considerations; public health, safety and welfare factors could not be taken into account. 435 U.S. at 692. If that test were to be applied here, the Berkeley ordinance would certainly be struck down.

It is extraordinary that the California court should state that its rejection of the traditional Rule of Reason approach would not foreshadow a return to an " 'essentially standardless inquiry into the reasonableness of local regulation.' " JS App. A-28; quoting *Boulder*, 455 U.S. at 67 (Rehnquist, J., dissenting).[20] It is hard to

[20] One of the bases for the majority's conclusion—that Congress could not have intended cities to be subject to treble damages (JS App. A-27)—is of course no longer valid. As noted above, more than two months prior to the decision below Congress passed the Local Government Antitrust Act of 1984, eliminating the possibility of civil damages against cities for violation of the antitrust laws. The California court nowhere referred to the Act, and apparently was not aware of it. It is, of course, highly unlikely that the Department of Justice will ever institute criminal antitrust actions against cities or their officials, absent some added element of criminality or proof of conduct wholly outside the realm of official duties. *See* Note, ***Municipal Antitrust: An Overview***, 60 Chi-

imagine a more standardless inquiry than the one the California court has now set in motion for courts reviewing all municipal regulation otherwise deemed violative of the antitrust laws. What is "a proper local purpose"? How much of a "rational[] relationship" need there be for the city's "legitimate exercise" of its police power, as it relates to the anticompetitive conduct? What would constitute an irrational relationship, or an illegitimate exercise of the police power? When is regulation operating in an "even-handed manner?" For example, where distinctions are made in the treatment of companies or individuals, must these distinctions be judged by rules such as those developed by this Court in a long line of Equal Protection cases, or is some other formula applicable? How would one prove that the city's purpose could be achieved as effectively by other means? What is "a less intrusive impact" on federal antitrust policies, and how would it be demonstrated? These and myriad other questions would entrap the courts in a quagmire of confusion and extended litigation.

Another important issue relates to which law governs these questions—state or federal. Under the California court's formulation, the answer would appear to be state law. That is, the court seems to be saying that since a city acting pursuant to its notion of the public interest is not in conflict with the federal antitrust laws, the state is free to adopt its own test of legality. Such a test would therefore be one under state law, subject to interpretation by state courts; California's unique test, for

Kent L. Rev. 349, 386 (1984). Thus, at worst, a municipality will face injunctive relief if its actions are deemed to violate the antitrust laws, and this is precisely the remedy that Congress has foreseen and approved. *See* H.R. Rep. No. 98-965 at 19, 22.

Similarly, the argument of the California Supreme Court (JS App. A-23) that the ordinance at issue is valid because it has a provision for adjusting prices from time to time in response to changed circumstances has been presented to and rejected by this Court on several occasions—most recently in *Maricopa County Medical Society*.

example, would not be binding on the courts of Massachusetts. On the other hand, the California court purported to construct its test out of federal Commerce Clause precepts.

Does a court apply state or federal law when it addresses the new California test? And even if state law applies initially, does that situation change once the court finds that a city fails to meet the test? That is, since the city would then no longer be immune from application of the federal antitrust laws, do traditional federal rules, such as the *per se* rule and the Rule of Reason, come into play?

These again, are perplexing issues that foretell a decade of litigative problem-solving by the courts—whether those courts be state or federal, or a combination of both.

Our principal point, however, is that neither this Court nor the court below should be engaged in a Rule of Reason analysis of the issues in this case. If a state wishes its cities to take on the mantle of state sovereignty in the area of rent controls, the Court has ruled that the state has the power to do so. Absent such an award of power to the cities by the state, the Court should assume that the state itself has made a judgment that its cities should be judged on the basis of normal antitrust standards. And the normal antitrust standard applied to the conduct engaged in by Berkeley—price fixing—is the *per se* rule. In other words, if the city is to be immunized, the immunization should come from the state, and not the courts.

CONCLUSION

For each of the above reasons—that Congress and California have both rejected a blanket exemption for, and the Rule of Reason approach to, cities—we respectfully urge that this Court do likewise.

Respectfully submitted,

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APPENDICES

APPENDIX A

AGREEMENT TO MEMBERSHIP IN THE COALITION FOR COMPETITION IN APARTMENT RENTALS

The undersigned persons who own rental housing in sections of the State of California in which rent control ordinances are in effect have joined together to form an unincorporated association to be called The Coalition for Competition in Apartment Rentals (the "Coalition") for the purpose of filing an *amicus curiae* brief supporting Appellant's opposition to a California rent control ordinance in the City of Berkeley as more fully described below. We do not intend for the Coalition to engage in any activities not connected with the filing of such a brief and do not consent to any such additional activities. The brief will be filed in the name of the Coalition, but with disclosure of the names of its members.

We consent to having other persons of similar views join the Coalition at any later time.

Membership in the Coalition, unless renewed, shall terminate upon the disposition by the Supreme Court of the United States of docket number 84-1538 entitled *Alexandra Fisher, Marguerite Jacobs, Mort Baker, Richard Lawhorn and Anthony Kenshaw, individuals; and Levin-Zemed, a California corporation, Appellants vs. City of Berkeley, California, a municipal corporation; Berkeley City Counsel; and Berkeley Rent Stabilization Board, Appellees.*

The Coalition has retained Elwood S. Kendrick, Inc. of the firm of Kendrick, Netter & Bennett, Los Angeles, California and E. Barrett Prettyman, Jr., of Washington, D.C., to represent the Coalition in connection with this matter. In joining this Coalition for this limited purpose, unless otherwise agreed, we shall not be responsible for any expenses, specifically including costs and attorneys fees. Any contributions toward such costs and ex-

penses are entirely voluntary and separate from this Agreement.

Each person signing below consents to become a member of the Coalition for the purposes and with the limitations stated.

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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

v.

CITY OF BERKELEY, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF AMICI CURIAE OF THE NATIONAL APARTMENT ASSOCIATION, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL ASSOCIATION OF HOME BUILDERS, CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA ASSOCIATION OF REALTORS®, CALIFORNIA LODGING INDUSTRY ASSOCIATION, CALIFORNIA BUILDING INDUSTRY ASSOCIATION AND WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF APPELLANTS

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TOPICAL INDEX

	Page
INTERESTS OF AMICI CURIAE	1
INTRODUCTION	5
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. THE CONGRESS INTENDED TO PROHIBIT MUNICIPAL OBSTRUCTION OF SHERMAN ACT OBJECTIVES IN THE ABSENCE OF "STATE ACTION"	10
II. THE BERKELEY ORDINANCE IS PREEMPTED BECAUSE IT IRRECONCILABLY CONFLICTS WITH THE SHERMAN ACT'S CENTRAL AND UNEQUIVOCAL PURPOSE OF PRESERVING PRICE COMPETITION	16
III. INVALIDATION OF BERKELEY'S PRICE-FIXING SCHEME DOES NOT THREATEN THE POWER OF LOCAL GOVERNMENT TO ATTEND TO LOCAL NEEDS	21
IV. NO "STATE ACTION EXEMPTION" APPLIES TO BERKELEY'S ANTICOMPETITIVE CONDUCT	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES:	PAGE
Anderson v. *Shipowner's Assn.*, 272 U.S. 359 (1926)	20
Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982)	20
Benson v. *Arizona State Bd. of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982)	23
Birkenfeld v. *City of Berkeley*, 17 Cal.3d 129 (1976)	27
Broadcast Music, Inc., v. *Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (1979)	21
Buck v. *California*, 343 U.S. 99 (1952)	10
California Retail Liquor Dealers Assn. v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)	17, 19
Chambers v. *Mississippi*, 410 U.S. 284 (1973)	27
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978)	*passim*
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982)	*passim*
Dr. Miles Medical Co. v. *John D. Park & Sons, Co.*, 220 U.S. 373 (1911)	20
Euster v. *Eagle Downs Racing Ass'n.*, 677 F.2d 992 (3d Cir. 1982)	23
Fidelity Federal Savings & Loan Association v. *De La Cuesta*, 458 U.S. 141 (1982)	11
Fisher v. *City of Berkeley*, 37 Cal.3d 644 (1984)	*passim*
Gambrel v. *Kentucky Bd. of Dentistry*, 689 F.2d 612 (6th Cir. 1982)	23
Gold Cross Ambulance & Transfer v. *City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983)	23
Golden State Transit Corporation v. *City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984)	23
Hines v. *Davidowitz*, 312 U.S. 52 (1941)	16, 18
Live Poultry Dealers' Protective Assn. v. *United States*, 4 F.2d 840 (2d Cir. 1924)	20
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948)	20
Nash v. *Florida Industrial Comm.*, 389 U.S. 235 (1967)	16
National Collegiate Athletic Assn. v. *Board of Regents of University of Oklahoma*, U.S. , 204 S.Ct. 2948 (1984)	21
National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978)	18, 20, 21

CASES:	PAGE
Northern Pacific Railway Co. v. *United States*, 356 U.S. 1 (1958)	18
Parker v. *Brown*, 317 U.S. 341 (1943)	9, 14, 16, 19
Radovich v. *National Football League*, 352 U.S. 445 (1957)	20
Rice v. *Norman Williams Co.*, 458 U.S. 654 (1982)	10, 11, 16, 17
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951)	17, 19
Springs Ambulance Co. v. *City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984)	23
Town of Hallie v. *City of Eau Claire*, 105 S.Ct. 1713 (1985)	13, 23, 25, 27
Union Carbide & Carbon Corp. v. *Nisley*, 300 F.2d 561 (10th Cir. 1962)	20
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)	18

CONSTITUTIONS, STATUTES AND BILLS:	
15 U.S.C. section 1 et seq.	*passim*
15 U.S.C. section 25	13, 14
Berkeley Ordinance No. 5261-N.S.	*passim*
California Constitution, Art, XI, §7	26
Consumer Goods Pricing Act of 1975, Pub. L. 94-145 §2, 89 Stat. 801	19
Government Code section 65589	26
Health and Safety Code section 1518	26
Health and Safety Code section 50008	26
Health and Safety Code section 50202	26
Health and Safety Code section 51852.5	26
H.R. 5992, 98th Cong., 2nd Sess. (1984)	15
La. Stats. Ann. 33:4791, Supp. 1985	24
Local Government Antitrust Act of 1984, P.L. 98-544	6, 13
Maine Rev. Stats. Ann., Title 30, Ch. 24	23
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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

v.

CITY OF BERKELEY, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF AMICI CURIAE OF THE NATIONAL APARTMENT ASSOCIATION, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL ASSOCIATION OF HOME BUILDERS, CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA ASSOCIATION OF REALTORS®, CALIFORNIA LODGING INDUSTRY ASSOCIATION, CALIFORNIA BUILDING INDUSTRY ASSOCIATION AND WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF APPELLANTS

INTERESTS OF AMICI CURIAE

Pursuant to Rule 36.2 of the Rules of Court, amici file this brief amicus curiae with the written consent of all parties to the case. The letter granting such consent has been filed with the Clerk of the Court.

NATIONAL APARTMENT ASSOCIATION: The National Apartment Association is a nonprofit association which, together with its state and local affiliates, represents the interests of all owners, developers, and operators of residential rental properties who provide shelter for more than 30 million households in this country.

NATIONAL ASSOCIATION OF REALTORS®: The National Association of Realtors® is a nonprofit professional association comprised of persons engaged in all phases of the real estate business. Its membership includes 50 State Associations of Realtors®, over 1,800 Membership Boards of Realtors®, and over 600,000 individuals. The National Association of Realtors® was created in 1908 to serve the public and this Nation by promoting professional competence in the rendition of real estate services and by protecting the rights of owners and users of land. Its efforts for three-fourths of a century both in the public and private sectors have contributed materially to making Americans the best housed people in the world.

NATIONAL ASSOCIATION OF HOME BUILDERS: The National Association of Home Builders represents approximately 134,000 builder and associate members organized in 800 affiliated state and local associations in the 50 states, District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, as well as remodelers and land developers. NAHB members construct at least two-thirds of all housing in the United States.

CALIFORNIA CHAMBER OF COMMERCE: The California Chamber of Commerce is a voluntary, nonprofit business association with more than 4,800 members from virtually every industry and geographic section in the State of California. The Chamber's membership also includes 150 trade associations and it is closely affiliated with 387 local and regional chambers of commerce and more than 167,000 small businesses. The Chamber estimates that its members and affiliated local chambers employ 75% of the private work force in California.

CALIFORNIA ASSOCIATION OF REALTORS®: : The California Association of Realtors® is a voluntary trade association whose members consist of Boards of Realtors® in California and those persons licensed by the State of California as real estate brokers and salespersons who are members of local Boards. CAR is the largest state trade association in the United States and has over 180 affiliated Boards of Realtors® and over 100,000 members. CAR is affiliated with the NATIONAL ASSOCIATION OF REALTORS®. The mission of CAR is to serve in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses successfully with integrity and competency and, through collective action, to promote the preservation of real property rights.

CALIFORNIA LODGING INDUSTRY ASSOCIATION: The California Lodging Industry Association is a statewide organization representing the interests of over 5,500 independent owner-operators of transient lodging properties in California, providing temporary shelter for millions of intrastate, interstate, and foreign travelers. Its purpose is to provide programs and services that assist members in realizing and maintaining reasonable returns on their investment properties and supporting an organizational structure that may be utilized to collectively address industry needs, interests, and issues. This segment of California's $29 billion tourism industry is threatened by the unilaterally assumed authority of local governments like Berkeley to strictly control price competition in the marketplace.

CALIFORNIA BUILDING INDUSTRY ASSOCIATION: The California Building Industry Association represents over 4,700 builders of housing and commercial structures throughout the State of California. CBIA members, in the aggregate, produce the majority of the housing construction in the Nation's most populous state. In furthering the interests of its members, CBIA collects and disseminates statistical and other information useful to the industry and represents the industry's interests in various public fora, including the courts.

WESTERN MOBILEHOME ASSOCIATION: The Western Mobilehome Association is a nonprofit organization of some 1,800 members who provide the public with approximately 190,000 mobilehome rental spaces. WMA was formed in 1945 to promote the interests of mobilehome park owners and operators in California through the sponsorship of educational programs, the collection and dissemination of information and publications of interest to mobilehome park owners and tenants, and by participation in legislative and judicial processes where the interests of its membership are at stake.

The issues presented in this case drastically impact upon commercial industries throughout the Nation and are of vital importance to *amici*. The test drafted by the California Supreme Court herein not only permits municipalities to control rent, but also gives them license to regulate nearly every aspect of the economy in the name of health, safety, and welfare, regardless of the impact on more overriding national goals. If this ill-conceived test, which departs significantly from the precedents established by this Court, is allowed to stand, industries throughout the Nation will fall by the sword of local governments whose only concern is to serve their own parochial interests, oblivious to the concerns of national economic policy.

The residential rental industry, vital as it is to the health and welfare of more than one-third of the national population, is increasingly threatened by overreaching municipal regulators who persist in creative and repetitive restrictions with callous disregard for constitutional limitations. The Nation's housing supply is seriously impaired because the economic well-being of the industries represented by *amici*, which require substantial and complex long-term planning and immense long-term financial commitment, is threatened by repeated and capricious regulatory acts such as Berkeley's rent control ordinance.

The practical experience of *amici* and financial industry data indicate that a major factor in the downturn in rental housing "starts" in recent years is increasing distaste toward rental properties as an investment vehicle due to the proliferation of local rent controls which impair profit margins and the capacity to service mortgage debt. As a result, investors and

their lenders are unwilling to risk the capital required to enter the marketplace and serve the consumers' ever-increasing demand for rental housing units. Rent controls not only impede growth, but actually impose a contraction in a huge sector of the market for property rentals and sales, builders' products and services, and mobilehome related services.[1] Thus, there is substantially less work for employees in industries like those represented by *amici* as well as others providing goods and services to the rental housing industry.

Municipal rent controls in California are causing measurable injury to these industries. The situation threatens to worsen should the opinion below be accepted as law, for municipalities nationwide would be free to enact rent-fixing schemes without state authorization and further wreak havoc. In view of these considerations, *amici* subscribe to this brief.

Counsel for *amici* are familiar with the questions presented in this case and the scope of their presentation, and believe that the information and perspective provided herein will assist the Court in its consideration of this matter.

INTRODUCTION

This action challenges as preempted by the Sherman Act, 15 U.S.C. Section 1, et seq., municipal rent control which displaces competition wholesale in the rental housing market in California, with substantial economic effects beyond that city's border. In the complete absence of state policy authorization, Berkeley's scheme eliminates price competition among lessees of housing, just as would a per se illegal buyers' cartel; it substitutes anti-market regulatory determinations based upon the vagaries of the local political process for the "regime of competition" mandated by federal policy.

Berkeley's ordinance demonstrates on its face a municipal judgment that competition itself is unreasonable. Berkeley has rejected the national policy favoring the allocation of resources

[1] The Mobilehome industry is uniquely threatened by municipal advocates of rent control as 51 of the 65 California cites and counties which have succumbed to the temptation to fix rents do so on mobilehome spaces only (of a total of 441 cities and 58 counties.)

through the efficiency of competitive markets over resource control by parochial political fiat. To be sure, the national procompetitive policy is qualified by federalism-based principles permitting *states* as *sovereigns* some discretion to substitute of regulation for competition. But those principles are of no aid here, for Berkeley enjoys no sovereignty of its own and California has not expressly authorized a policy of displacement of price competition in housing with price regulation.

Although the California court upheld Berkeley's scheme under state law, its decision was based on a general "home rule" police power which this Court has held insufficient to insulate municipal suffocation of competition from the national mandate. As the court below acknowledged, California has no state rent control statute. Nor has the recent Congressional enactment of the Local Government Antitrust Act of 1984 relieved Berkeley of its substantive obligations under federal antitrust laws or immunized its ordinances from federal preemption. That Act merely restricted damages while—consciously and deliberately, as its history amply demonstrates—leaving unchanged other remedies for conflicting municipal actions.

Finally, containment of Berkeley's assault on national competitive policy is fully consistent with federalist comity between state and federal institutions. Preempting Berkeley's price-fixing ordinance will not significantly interfere with the ability of municipal governments to meet local needs. State legislatures remain free to grant local anticompetitive programs the state's own protective mantle. They and the Congress are entitled to the presumption that they can and will respond with timely legislation where the need arises.

SUMMARY OF ARGUMENT

In 1980, the City of Berkeley adopted the "Rent Stabilization and Eviction for Good Cause Ordinance" ("the Ordinance"). Appendix G to Jurisdictional Statement ("Appendix"). The Ordinance places a ceiling on the rent that landowners are permitted to charge for approximately 23,000 rental units in Berkeley. Thus, the Ordinance ended market competition throughout this large and important sector and

effectively insulated the current tenants of the controlled units from price competition with other prospective consumers, both from within or without Berkeley. Even though the Berkeley scheme is not affirmatively authorized by state law, the California Supreme Court upheld the Ordinance against a claim that it facially conflicted with and was thus preempted by the Sherman Act. *Fisher* v. *Berkeley,* 37 Cal.3d 644, 678 (1984); Appendix A at A-35. Regardless of the extent to which it might frustrate the national policies embodied in the antitrust laws, that court concluded that an anticompetitive restraint imposed as an act of local government can withstand a claim that it impermissibly conflicts with the Sherman Act so long as it furthers some local purpose rationally related to the municipality's legitimate exercise of its police powers. *Id.* at 675, A-31.

The California Supreme Court acknowledged that its approach to the preemption issue was novel. According to the court, resolution of the antitrust issues posed by the case forced it to "wander off the map and travel cross country without the benefit of trail or compass." *Id.* at 663, A-15. But the court's predicament was one of its own making. In analyzing whether there was a conflict between the antitrust laws and the challenged regulatory scheme, the California court failed to follow the guidance of this Court in opinions that have considered the applicability of the federal antitrust laws to anticompetitive restraints imposed by municipal governments.

Precedents of this Court have clearly established that any arrangement that interferes with the setting of price by free market forces is illegal on its face; that municipal action which discourages conduct encouraged by federal laws is preempted; and that municipal acts inconsistent with Sherman Act objectives may only be saved from preemption where shown to be undertaken pursuant to affirmatively expressed state policy to displace competition with regulation. The California court has ignored these principles and adopted an approach to the antitrust preemption issue that gives municipalities sweeping authority to enact ordinances that favor local constituencies or promote purely parochial or special interests at the expense of the national interests embodied in the antitrust laws. Indeed, it effectively leaves local governments free to disregard these

national interests altogether. No matter how clearly and directly a municipal ordinance might conflict with the core objectives of the federal antitrust laws, it would not be subject to preemption under the California test so long as it advanced, or even purported to advance, some avowed local purpose that can be "rationally related" to the municipal "peace, safety, morals, health or welfare."

The California court's approach permits cities to elevate local policy above important national objectives, effectively standing the Supremacy Clause on its head. It renders the Sherman Act a nullity as applied to many of the most egregious anticompetitive restraints that could be imposed as an act of municipal government. In contrast, this Court has already concluded that the federal antitrust laws reach such restraints. Under general preemption principles, a municipal ordinance which impermissibly conflicts with the federal antitrust laws is invalid, and this Court should so hold in this case because the facial conflict between Berkeley's rent control ordinance and the Sherman Act is unambiguous.

The relief urged herein is straightforward and simple, requiring none of the sweeping changes in the law urged by Berkeley and the court below. Applying familiar, existing law of antitrust scrutiny of price-fixing to Berkeley's activity on its face produces the predictable conclusion that the scheme is virtually indistinguishable in economic effect from long-condemned buyer cartels. The issue is not whether a "violation" as such has occurred, but whether this scheme produces results similar to those produced by a cartel violation, which clearly is the case. Straightforward acknowledgment of inherent conflict between "parochial" interests of discrete local constituencies and national procompetitive goals, combined with other teachings of this Court, make clear that resolution of the question of "conflict" between the Sherman Act and acts of local entities exclude social policy arguments properly directed to legislative bodies.

Berkeley's Ordinance facially abolishes competition among buyers and even criminalizes the setting of price by free market forces. Under this Court's well-established authorities, Berkeley's scheme "conflicts" with the Sherman Act on its face.

Under similarly well-settled preemption analysis, any such facial conflict which invariably precludes obedience to both local and federal policies results in preemption of the obstructing municipal program, unless there has been conferred an exemption from federal policy control. Exemption from Sherman Act policy, it is also well established, is available to municipalities only where they can show their actions to be "state action," implementing affirmatively expressed state policy to displace competition with regulation in that sphere of activity. As the California court has acknowledged, "California has no state rent control statute." Opinion below, 37 Cal.3d at 655, Appendix A at A-6. This question of exemption is, therefore, straightforward and requires no novel extensions of existing law to conclude that the absence of a state policy determination provides no exemption for Berkeley's unilateral acts in derogation of clear federal policy.

The relief sought in this action—a determination that Berkeley's price-fixing scheme is in conflict with federal statutory policy, lacks such state policy sanction as would confer exemption therefrom, and accordingly is preempted—requires no revolutionary extensions of existing stare decisis, but simply straightforward application thereof. Contrary to the California court's rudderless wandering, the well-known *Parker/Lafayette/Boulder*[2] trail, reinforced by 1984 Congressional action, leads inexorably to condemnation of the Berkeley scheme. All that is really required is judicial acknowledgment that Congress *intended* to preempt municipal conduct which is plainly anticompetitive, such as in this case, in the absence of a supportive policy determination by a sovereign state to which federalist comity is to be afforded. All that is required, then, is to see Berkeley's abolition of competition for what it is and apply the clear will of Congress thereto.

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[2] Parker v. Brown, 317 U.S. 341 (1943); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

ARGUMENT

I. THE CONGRESS INTENDED TO PROHIBIT MUNICIPAL OBSTRUCTION OF SHERMAN ACT OBJECTIVES IN THE ABSENCE OF "STATE ACTION"

Preemption is governed by the Supremacy Clause of Article VI of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [U.S. Const., Art. VI, cl. 2.]

A claim of preemption under the Supremacy Clause based on a conflict with the Sherman Act is evaluated under the same general principles applicable to an alleged conflict with any other federal statute:

> In determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. [*Rice* v. *Norman Williams Co.* 458 U.S. at 654, 659 (1982).]

A local ordinance is similarly preempted when it irreconcilably conflicts with a federal statute or regulation. *Buck* v. *California,* 343 U.S. 99 (1952) (applying preemption analysis but holding that the particular local ordinance did not conflict with the federal law in issue).

In deciding whether a local ordinance is preempted by the Sherman Act, a court must first examine whether Congress intended the Sherman Act to reach anticompetitive actions taken by local governments. "The preemption doctrine, which has its roots in the Supremacy Clause, requires [the Court] to

examine congressional intent." *Fidelity Federal Savings & Loan Association* v. *De La Cuesta,* 458 U.S. 141, 152 (1982). In *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1977), this Court first considered the extent to which the antitrust laws prohibit cities from "imposing anticompetitive restraints as an act of government." *Id.* at 391. Although the issue arose in the context of the applicability of the so-called "state action exemption" attributed to *Parker* v. *Brown,* 317 U.S. 341 (1943), *Lafayette* and its progeny are also relevant to the inquiry into Congressional intent required under preemption doctrine. As the Court explained in *Lafayette,* the word "exemption" is simply "a shorthand expression" for whether the Sherman Act was "intended by Congress to prohibit the anticompetitive restraint" imposed by the defendant cities in that case. *Id.* at 393 n.8. The Court's conclusion that municipal efforts to impose anticompetitive restraints as an act of government are not "exempt" from antitrust scrutiny is also dispositive of the inquiry whether the preemption doctrine applies when a local ordinance irreconcilably conflicts with the Sherman Act.

In *Lafayette,* the cities argued that, because a municipality is merely a subdivision of a state and only exercises power delegated to it by the state, *Parker's* findings regarding the congressionally intended scope of the Sherman Act apply with equal force to the state's political subdivisions. The Court rejected this argument. *Parker,* the Court emphasized, was based on deference to our "governmental structure of federalism." *Id.* at 400. The basis for *Parker's* holding that the federal antitrust laws do not prohibit a State, "as sovereign," from imposing certain anticompetitive restraints as an act of government was that:

> [G]iven our "dual system of government" in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority," 317 U.S. at 351, a congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred. [*Id.* at 411-412, quoting *Parker* v. *Brown,* 317 U.S. at 351.]

The Court concluded that cities could not displace the mandates of federal antitrust policy when they restrain competition as an independent act of local government:

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them . . . . In light of the serious economic dislocation which the would result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach. [*Id.* at 412-413.]

The *Lafayette* Court observed that there were over 62,000 different units of local government in the United States. In concluding that cities were not exempt from the prohibitions of the antitrust laws, the Court emphasized that, because of their natural inclination to favor local political constituencies, the economic choices made by local governments carried with them:

> [T]he potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. [*Id.* at 408.]

The Court even went as far as to observe that because, by their very nature, the economic choices of local governments are designed to "ensure maximum benefit for the community constituency," they are "not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." *Id.* at 403. For these reasons, the Court concluded that the antitrust laws were intended to reach anticompetitive restraints imposed as an act of municipal government unless the restraint was imposed

"pursuant to state policy to replace competition with regulation or monopoly public service." *Id.* at 413. In the absence of evidence that the State authorized or directed the municipality to act as it did, to permit municipalities to be shielded from the antitrust laws when they impose anticompetitive restraints would, "impair the goals Congress sought to achieve by those laws . . . without furthering the policy underlying the *Parker* 'exemption.'" *Id.* at 415.

Limitation of the municipal antitrust exemption to anticompetitive restraints imposed pursuant to a "clearly articulated and affirmatively expressed state policy" was reaffirmed in *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40 (1982. In *Boulder,* the the Court held that Colorado's "home rule" constitutional provision, which conferred upon municipal governments general authority to govern local affairs, did not shield the city from an antitrust challenge to its regulation of cable television. And just last Term, the Supreme Court reemphasized the need for "clearly articulated and affirmatively expressed state policy" to minimize the danger that municipalities will engage in activities which further their own "purely parochial public interests" at the expense of the national economic goals reflected in the antitrust laws. *Town of Hallie* v. *City of Eau Claire,* 105 S.Ct. 1713 (1985).

In the wake of *Lafayette* and *Boulder,* Congress enacted the Local Government Antitrust Act of 1984, P.L. 98-544. The Act and its history are instructive as to Congressional intent. Under the Act, antitrust damages "may not be recovered from any local government, or official or employee thereof acting in any official capacity," a question explicitly left open in both *Lafayette* (435 U.S. at 402) and *Boulder* (455 U.S. at 56-57 n.20). Congress did not, however, disturb the applicability of injunctive relief under Section 16 of the Clayton Act (15 U.S.C. §25 (1982)) to anticompetitive restraints imposed by local governments. It thus confirmed the accuracy of this Court's conclusion that the antitrust laws are meant to prohibit such restraints.

The Act is expressly *not* intended to modify either the substantive antitrust standards evolved by this Court or the *Parker* doctrine:

H.R. 6027 would in no way limit the antitrust immunity for states that the courts have recognized in *Parker* v. *Brown*, 317 U.S. 341 (1943), and subsequent decisions interpreting the "state actions" doctrine. The bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law. For example, there will be no change in the substantive antitrust law applicable to local governments, or persons with whom they deal, in suits for injunctive relief under Section 16 of the Clayton Act, . . . [House Judiciary Committee Report to the Committee of the Whole House on H.R. 6027, H.R. Rep. 98-965, 98th Cong., 2d Sess. (1984), at 2.]

That reaffirmation of existing judicial interpretation of "substantive antitrust law" by the Congress stands in stark contrast to the opinion below which rejects out of hand the application of "traditional antitrust rules." 37 Cal.3d at 664; Appendix A at A-17. Not only does the opinion of the California court depart significantly from the intent of Congress as to existing substantive stare decisis, but that court went on to adopt a standard of municipal exemption virtually indistinguishable from proposed provisions of the Act which Congress had just rejected. The California court stated its test thusly:

> [W]e have determined that when the validity of an ordinance is challenged under the federal antitrust laws, courts must adapt traditional antitrust rules in order to accommodate municipal governments' legitimate interest in enacting economic and social regulations concerning local health, safety and welfare. We conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with section 1 or 2 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. [37 Cal.3d at 651-652; Appendix A at A-2.]

Yet Congress had just rejected H.R. 5992, § 3, 98th Cong., 2d Sess. (1984), which would have provided that, "the antitrust laws shall not apply to official conduct of a local government reasonably undertaken to protect or provide for the public health, safety or welfare." Congress also declined to enact an urged "municipal rule of reason" which was described by Professor Thomas Campbell as follows:

> When a court is presented with a restriction on competition, the Court would engage in a less restrictive alternative analysis * * * [which would] simply require the court to ask, could the unit of local government have achieved its safety, its health, its public welfare objective in a way less restrictive of the Federal interest in competition, less harmful to the consumer. [H.R.Rep. 98-965, supra, at 16.]

The House Report, H.R.Rep. 98-965, describes a number of other proposals of like import, and sets forth unequivocally the Congressional rationale for *not* providing the form of relief suggested by the court below:

> The Subcommittee did not adopt the concept of a ban against private actions aimed at municipalities and their officials. The role of "private attorneys general" in the antitrust enforcement scheme remains central. *If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.* The record does support, however, the notion that municipalities—and their taxpayers who must ultimately shoulder the burden—should not be subject to punitive sanctions in the form of treble damages. [*Id.* at 18 (emphasis added).]

In summary, municipal economic regulations which lack clearly articulated state authorization or direction, though perhaps not violating the letter of the antitrust laws, nonetheless irreconcilably conflict with their underlying objectives, and are properly subject to preemption. Otherwise, cities will have

sweeping power to enact anticompetitive ordinances that "place their own parochial interests above the Nation's economic goals reflected in the antitrust laws." *Lafayette,* supra, at 413.

II. THE BERKELEY ORDINANCE IS PREEMPTED BECAUSE IT IRRECONCILABLY CONFLICTS WITH THE SHERMAN ACT'S CENTRAL AND UNEQUIVOCAL PURPOSE OF PRESERVING PRICE COMPETITION

In a long series of cases, this Court has established the principles for determining when a state or local law impermissibly conflicts with and is thus preempted by a federal statute: "A conflict will be found 'where compliance with both federal or state regulations is a physical impossibility' . . . or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941). Under preemption analysis, as *Hines* makes clear, a conflict between a federal statute and a local ordinance can arise in either of two different ways: An ordinance can compel conduct that the federal statute prohibits; alternatively, an ordinance can effectively prohibit conduct that the federal statute seeks to promote. *See, e.g., Nash* v. *Florida Industrial Comm.,* 389 U.S. 235 (1967); *Jones* v. *Rath Packing Co.,* 430 U.S. 519 (1977).

The raisin pricing scheme upheld in *Parker* v. *Brown,* supra, 317 U.S. 343 (1943), unquestionably was in "conflict" with the objectives of the Sherman Act; it was saved only because it fit within an implied *exemption* therefrom. 317 U.S. at 350-351; cf. Tribe, *American Constitutional Law,* § 6-24 (Foundation Press, 1978). The issues of "conflict" and "exemption" are separate issues, dealing on the one hand with economics and on the other with federalist comity.

In *Rice* v. *Norman Williams Co.,* 458 U.S. 654 (1982),this Court determined that an importer "designation" statute which appeared to restrain intraband competition in liquor did not "irreconcilably" conflict with the Sherman Act on its face. Since restraint of intraband competition was not a per se prohibited activity, the Court reasoned it could not be *facially* determined that the Acts were "irreconcilably" in conflict,

distinguishing that situation from *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum Inc.,* 445 U.S. 97 (1980), on the basis that the *Midcal* scheme on its face abolished price competition (just like the Berkeley Ordinance here), a restraint long adjudged per se unreasonable. *Id.* at 659-660. Accordingly, *Rice* reaffirms the principle that, absent *Parker* immunity, a scheme which compels abandonment of the setting of price by free market forces is "irreconcilably" in conflict with federal antitrust policy.

As in *Midcal,* the Berkeley Ordinance on its face prohibits competitive conduct that the Sherman Act seeks to promote, and similarly is preempted under familiar "irreconcilable" conflict analysis. Proof of "violation" is not necessary. Even those cases in which this Court has invalidated a state law that mandated or authorized a "violation" of the antitrust laws have in fact dealt with schemes creating the functional equivalent of a violation, rather than a "violation" as such.[3] For example, under the statute struck down in *Midcal,* wine producers and wholesalers were required to either sell under fair trade contracts or to post and follow a resale price schedule. No private agreement was involved whenever producers or wholesalers elected to post resale prices. (The state compulsion prohibiting resale price competition eliminated the need for a private agreement.) Similarly, in *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951), the conflict with the antitrust

[3] It is an open question whether, solely by enacting an ordinance that eliminates price competition, a city could ever be deemed to have "violated" the Sherman Act. In many such cases, it will probably be difficult to prove that a city participated in unlawful concerted action. The California Supreme Court, however, also suggested that the Berkeley rent control ordinance was not subject to preemption unless the plaintiffs could demonstrate "the requisite concerted action" necessary to establish an antitrust violation. 37 Cal.3d at 662, Appendix A at A-15. Appellants demonstrate that the Ordinance mandates joint anticompetitive conduct. Jurisdictional Statement at 12; Appellant's Reply Brief to Appellee's Motion to Dismiss or Affirm at 3. Even so, the concerted action requirement has no logical applicability to a situation in which an anticompetitive local ordinance is challenged on the grounds that it stands as an obstacle to accomplishment of the full purposes and objectives of the Congress in enacting the antitrust laws. The principal claim here is not that the city seeks to authorize or compel illegal anticompetitive behavior, but rather that, by an act of government, it has prevented procompetitive behavior. *See generally* P. Areeda & D. Turner, *Antitrust Law,* Vol. 1, (Little, Brown & Co., 1978).

laws arose from the state-imposed requirement that non-contracting retailers abide by "fair trade" prices. A manufacturer's use of a fair trade contract, which by operation of law triggered the non-signer requirement, was not itself illegal and did not conflict with the Sherman Act as amended by the Miller-Tydings Act. The statute was invalidated because it imposed a restraint on non-signers, such that they were "driven into a compact in violation of the *spirit* of the proviso [of the Miller-Tydings Act] which forbids 'horizontal' price fixing." 341 U.S. at 389 (emphasis added).

It is open to earnest debate—and unnecessary to disposition of this case—whether in light of the potential defense of compulsion of (albeit unlawful) law, the Berkeley Ordinance mandates private conduct that "violates" the antitrust laws. More importantly, however, the Ordinance on its face "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the antitrust laws. *Hines* v. *Davidowitz*, supra, at 67. Clearly, it compels private conduct that, if agreed on by private parties, would be a per se violation of the antitrust laws.

Certain practices are held to be per se violations of the Sherman Act because the practice facially appears to be one that would always or almost always tend to restrict competition. *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1978). The most notorious group of per se illegal Sherman Act violations are those that fix prices or otherwise eliminate price competition. Because "[p]rice is the central nervous system of the economy,'" *National Soc. of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1977), quoting *United States* v. *Socony-Vacuum Oil*, 310 U.S. 150, 224-226 n.59 (1940), the preservation of price competition is an object of special solicitude under the antitrust laws. Through the operation of free markets, price competition produces "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time producing an environment conducive to the preservation of our democratic, political and social institutions." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4

(1958). Accordingly, local governmental regulations that eliminate price competition are especially suspect under the Sherman Act.

Indeed, this Court has consistently invalidated or refused to enforce state statutes that precluded competitors from engaging in fully competitive pricing. In *Schwegmann*, the Court was faced with a state liquor law that allowed resale price maintenance. Resale price maintenance was legal at that time under the Miller-Tydings Act.[4] However, the state law at issue in *Schwegmann* not only authorized resale price maintenance between a manufacturer and those retailers who voluntarily agreed to be bound by the manufacturer-determined resale price, but also required non-contracting retailers to abide by the same price. In effect, the state was mandating parallel pricing among all retailers of a particular product. Reversing an injunction against a non-signing retailer for selling at less than the official prices, the Court held that:

> [T]he Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against "horizontal" price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. *See Parker* v. *Brown*, 317 U.S. 341, 350. Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual "vertical" agreements with all his retailers. But when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids "horizontal" price fixing. [341 U.S. at 389 (footnote omitted; emphasis in original).]

Similarly, the Court in *Midcal* struck down a California statute that prohibited fully competitive pricing in the wholesale distribution of wine. California required wine producers and wholesalers either to sell wine under fair trade contracts or to

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[4] Ch. 690, 50 Stat. 693 (1937) (codified at 125 U.S.C. §1). The Miller-Tydings Act was repealed by the Consumer Goods Pricing Act of 1975, Pub. L. 94-145, § 2, 89 Stat. 801.

post resale prices that would bind all of the wine merchants in a trade region. In striking down the statute, the Court noted that such a restraint "destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.' " 445 U.S. at 103, quoting *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911). Because the state had prohibited full price competition, the law could not be enforced.

The rent ceiling imposed by the Berkeley Ordinance bans the use of price competition as a mechanism to allocate access to existing rental housing in the city. It thus represents "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Soc. of Professional Engineers* v. *United States*, supra, at 679. And the fact that the ordinance establishes maximum rather than minimum prices does not diminish the seriousness of this conflict. As this Court recently stated, the antitrust laws are "grounded on faith in price competition as a market force and not on a policy of low selling prices at the price of eliminating competition." *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 348 (1982), quoting Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 N.W.U. L.Rev. 137, 142 (1962).[5] The Sherman Act "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *National Soc. of Professional Engineers* v. *United States*, supra, at 679.

[5] The price ceiling imposed by the Berkeley Ordinance is more analogous to the maximum price set by a cartel of buyers with market power than the producer price ceiling held per se illegal in *Maricopa*. Buyer cartels are just as harmful as seller cartels. As in the case of the standard producer price fixing cartel, the price fixed by a buyer cartel restricts total output in the interest of appropriating the maximum possible surplus to the cartel members. Although the observation is not critical to the argument advanced here, it is worth noting that the courts have consistently condemned buyer cartels under the Sherman Act. *See, e.g.*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) (agreements among competing buyers to purchase at specified price violates the Sherman Act); Radovich v. National Football League, 352 U.S. 445 (1957); Anderson v. Shipowners' Assn., 272 U.S. 359 (1926); Live Poultry Dealers' Protective Assn. v. United States, 4 F.2d 840 (2d Cir. 1924) (Sherman Act forbids all agreements preventing price competition among members of a group of buyers if they are numerous enough to affect the market); Union Carbide & Carbon Corp. v. Nisley, 300 F.3d 561, 575 (10th Cir. 1962).

On its face, the Berkeley Ordinance demonstrates direct and irreconcilable conflict with the core objective of the Sherman Act—the preservation of price competition as the congressionally preferred means of allocating resources among alternative users. An agreement among private parties that " 'interferes with the setting of price by free market forces' [citation] is illegal on its face," even if, strictly speaking, the agreement does not amount to "price fixing as such." *National Soc. of Professional Engineers* v. *United States*, supra, at 692 (holding illegal a privately adopted ban on competitive bidding). When accomplished by a municipal act of government, the threat to the national policy posed by a ban on price competition is even greater. Private efforts to eliminate price competition by agreement are invariably subject to erosion due to cheating by the participants or entry by other producers who are not bound by the price fixing agreement. When prices are fixed by municipal law, however, the restraint is airtight.

III. INVALIDATION OF BERKELEY'S PRICE-FIXING SCHEME DOES NOT THREATEN THE POWER OF LOCAL GOVERNMENT TO ATTEND TO LOCAL NEEDS

Not every local regulation that restrains competition irreconcilably conflicts with the antitrust laws. Not even private parties are prohibited from engaging in joint ventures and other kinds of cooperative arrangements where an agreement on price is "necessary to market the [jointly produced] product at all." *Broadcast Music, Inc.*, v. *Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 23 (1979). *Cf. National Collegiate Athletic Assn.* v. *Board of Regents of University of Oklahoma* ____ U.S. ____, 204 S.Ct. 2948 (1984). The provision of most traditional public functions of government, such as fire and police protection, entail "natural monopolies," reasonably acquired and long held to be beyond the reach of the Sherman Act. Regulation of the use of the cities' own "integral" facilities such as streets, sidewalks, and public buildings do not generally implicate antitrust laws any more than the choices of a private actor to unilaterally determine the price and terms upon which it will sell or lease its property. Such unilateral requirements

are *consistent* with antitrust policy, reflecting the function of another independent decisionmaker in the marketplace. Simply put, the vast majority of familiar government actions are neutral or facilitative toward the competitive, free-market model of the economy which the Congress sought to promote. Thus, state or local regulation that enhances the same ends sought to be achieved by the Sherman Act is permissible without conflict with the federal antitrust laws.

In contrast, economists are "virtually unanimous in their condemnation of rent control laws." 37 Cal.3d at 716, Appendix A at A-83 (Lucas, J., dissenting). Despite well-intentioned social objectives they restrict output, exacerbating the shortage they claim to remedy.[6] Under *Lafayette* and *Boulder,* local governments are not free to sacrifice the national objectives embodied in the antitrust laws whenever they want to bestow an economic benefit on a local political constituency (such as current occupants of rental housing) at the expense of a less well-represented, perhaps "absentee," group (such as rental owners or prospective tenants). Nor, unless the antitrust laws are to be rendered a virtual nullity as applied to anticompetitive restraints imposed as acts of local government, can municipalities be permitted to sacrifice these concrete national objectives to such ephemeral asserted local goals as promoting the "diversity" of the local rental community or relieving a political constituency from "unwarranted" rent increases due to a putative housing crisis.[7]

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[6] *See, e.g.,* Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 692 (1983); Siegan, *Commentary on Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 733 (1983); Baird, *Rent Control: The Perennial Folly,* 54-78 (1980); *Rent Control, A Popular Paradox* (Fraser Institute ed. 1975); Rabin, *The Revolution in Residential Landlord-Tenant Law,* 69 Cornell L. Rev. 517, 555; (1984) Friedman & Stigler, *Roofs or Ceilings? The Current Housing Problem,* in *Rent Control, A Popular Paradox,* supra, 100; Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws,* 69 Cornell L. Rev. 604, 609-610 (1984).

[7] Empirical studies of rent control show that, without exception, its predominant effect is a deterioration in rental housing stock and a decrease in its availability, thus aggravating the effects of any housing crisis that might actually exist. *See* Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws,* 69 Cornell L. Rev. 604 (1984); Johnson, *Rent Control and Distribution of Income,* 41 Am. Econ.

(footnote continued on following page)

Most importantly, those municipal activities which do have demonstrable anticompetitive effects enjoy adequate state policy support to shelter them within the exemption of *Parker* v. *Brown.* Certainly judicial experience to date has reflected this fact; of the dozens of practices thus far examined in the courts, only a handful have been found non-exempt.[8] This would seem a fairly reliable indicator that if nearly all practices thought *vulnerable* to challenge are exempt, an even larger proportion of existing practices that have not been contested enjoy similar protection. For example, *every* municipal rent control program known to *amici* outside the State of California is a part of or authorized by a state program of rent regulation. *See, e.g.,* McKinney's Unconsolidated Laws of New York, Book 65, Section 2A: 42-74 et seq.; Massachusetts General Laws, Ch. 797, Section 1 et seq. and Ch. 842, Section 1 et seq.; Maine Rev. Stats. Ann., Title 30, Ch. 24; Barr, et al., 8 Clearinghouse Review 240-9 (1974) and statutes cited therein. Accordingly, it would be erroneous to assume that preemptive

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(footnote continued from preceding page)

Rev. 569 (1951); and Grampp, *Some Effects of Rent Control,* 16 S. Econ. J. 425 (1950). *See generally,* bibliography in *Rent Control—Myths & Realities,* E. Block and E. Olsen ed. (1981) citing over two hundred articles to this general effect. It should also be noted that there are other, generally more efficient ways than rent control of dealing with a genuine housing crisis that do not entail the elimination of price competition or otherwise irreconcilably conflict with the antitrust laws. In his dissent to the opinion of the California court, Justice Lucas listed some of the non-conflicting alternatives available to the city: *"Rent subsidies* may be provided to needy tenants. *Public housing grants* may afford additional units. Property may be municipally acquired through *negotiated purchase or condemnation."* 37 Cal.3d at 718, Appendix A at A-86. (Emphasis in original.) There is also no rational reason to believe that rent control expands the housing opportunities of minorities or the aged. When price is prohibited by law from being used to allocate access to rental housing, the importance of other selection criteria is enhanced.

[8] *See, e.g.,* Town of Hallie v. City of Eau Claire, 105 S.Ct. 1713 (1985); Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983); Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612 (6th Cir. 1982), Euster v. Eagle Downs Racing Assn., 677 F.2d 992 (3d Cir. 1982); Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272 (9th Cir. 1982); Golden State Transit Corporation v. City of Los Angeles, 726 F.2d 1430 (9th Cir. 1984); Springs Ambulance Co. v. City of Rancho Mirage, 745 F.2d 1270 (9th Cir. 1984), and cases cited therein. *Springs Ambulance* may be an exception inasmuch as a question remains whether one non-exempt aspect of the price fixing has been abandoned by the city, 745 F.2d at 1273-1274.

invalidation of the Berkeley Ordinance would necessarily impact upon state-authorized rent controls in other jurisdictions.

Nor can it be overlooked that municipalities confronted with antitrust claims have a viable and effective political remedy for defective or non-expressed authorizations which fail to insulate their activities. Where a city is engaging in activity which truly is consistent with state policy, that city should have little difficulty persuading its legislature to enact clearer authorizations to stifle any litigation which threatens on that basis to thwart the furtherance of that (inadequately expressed) state policy. If, of course, the municipality encounters stiff opposition and *cannot* obtain express authorization, something real and tangible will have been demonstrated regarding the existence or nonexistence of such a policy. It is certainly fair to suggest that popular legislation moves more swiftly than preemption litigation (particularly where a program important to state policy is under attack and can be saved by legislation merely expressing existing policy). It is hard to conceive of any substantial risk that genuinely state-approved programs will suffer the disability of preemption—or that following such invalidation the legislature would fail to correct the situation promptly.

At least one recent real-world example of this mechanism is illustrative. In 1984, in response to a Federal Trade Commission action against the City of New Orleans for suppression of taxicab competition, the Louisiana State Legislature promptly enacted an authorizing statute which painstakingly articulates and expresses a state policy to permit the city to restrain taxicab competition through the means then under attack. La. Stats. Ann. 33:4791, Supp. 1985. If this instant claim of preemption really threatened the policies of the State of California remedial legislation would have been enacted by now or certainly would be enacted swiftly on the heels of the judgment of invalidity urged herein. The plain truth is that Berkeley has pursued simply and solely its own parochial interests. As *Lafayette* and *Boulder* make clear, municipal governments are not free to promote every purely parochial interest that can be rationally related to the municipality's police powers at the expense of the paramount national objectives embodied in the federal antitrust statutes. Berkeley

has subordinated the national policy in favor of price competition, an object of special solicitude under the antitrust laws, for the sole purpose of shifting wealth to a favored discrete political constituency—current occupants of the city's rental housing—by insulating them from future price competition with other prospective tenants.[9] This facially evident course of conduct is nothing less than the "parochial" rejection of federal policy forewarned in *Lafayette*. Unless preempted, the precedents of this Court and the will of Congress will be "wholly eviscerated" by Berkeley under the guise of its municipal police power.

IV. NO "STATE ACTION EXEMPTION" APPLIES TO BERKELEY'S ANTICOMPETITIVE CONDUCT

As this Court has repeatedly ruled, most recently in *Town of Hallie* v. *City of Eau Claire*, 105 S.Ct. 1713 (1985), even those anticompetitive acts of local governments which conflict with the economic policy of the Sherman Act are exempt by Congressional intent if they constitute "state action" pursuant to "clearly articulated and affirmatively expressed" state policy to displace competition with regulation. No such policy shelters Berkeley's scheme. As noted by the court below, "California has no state rent control statute." Opinion below, 37 Cal.3d at 655, Appendix A at A-6. The relevant portions of the statutes belatedly asserted by Berkeley below as stating a policy on rent control are set forth verbatim in the Jurisdictional Statement, pages 4-5. As a reading thereof readily demonstrates, each of those statutes is either a declaration of *neutrality* as to rent control or a preemptive *prohibition* thereof in a specific context.

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[9] For example, Under Section 12, subdividion (c)(3) of the Ordinance, a landowner is not entitled to increase the rent on a unit to reflect the cost of capital improvements unless those improvements were "necessary" to bring the property into compliance with applicable local code requirements affecting health and safety. Thus, because he could not charge a commensurately higher rent, the landowner would have absolutely no incentive to incur the costs of upgrading his rental property so as to make it attractive to a different clientele than the one currently occupying it. Together with the rent ceiling, this provision thoroughly insulates current occupants from having to compete with other potential future consumers of the rental housing they now occupy—an economic boon of no small value.

Government Code §65589 not only declares at subdivision (b) that nothing in that article constitutes *authorization* for rent controls; it also disclaims in subdivision (c) that it similarly does not grant additional authority for "measures that may be taken . . . to implement" the state housing policy embodied in that article. This distinction shows that the Legislature saw rent control as something *other than* a measure taken to implement state housing policy.

Health and Safety Code §1518 prohibits rent controls on licensed community care facilities, which Berkeley now theorizes was an implied *authorization* of controls in any other context. Such silence cannot be construed as anything more than *neutrality* and certainly not a "clearly articulated and affirmatively expressed" policy favoring price regulation to the exclusion of competition in rental housing.

Health and Safety Code §§50008 and 51852.5 likewise contain no authorization for municipal rent control. While subdivision (a)(2) of §51852.5 may appear to "contemplate" rent controls as to certain low income households, that section is part of a government-supported mortgage program wherein owners of property freely contract to supply a number of low-income units at controlled rents in consideration for low-cost financing. Section 50202 provides the key to §51852.5; it states clearly that (a) it does *not* authorize controls on units not financed under that program, and (b) there are permitted *no* controls on the latter units other than those specified in the regulatory contract freely entered into by the owner in consideration for the financing advantages conferred.

It follows that the "state policy" now claimed by Berkeley is made up of expressions of neutrality, disclaimers, and prohibitions—hardly a "clearly articulated and affirmatively expressed" enlistment of Berkeley as agents of the state to implement state policy, thereby implicating federalism. Acceptance of these neutral-to-negative "mentions" of rent control as an affirmative policy statement would truly "wholly eviscerate" the precedents of this Court. See *Community Communications* v. *City of Boulder*, supra, at 55-56. The real source of authority for Berkeley's price-fixing scheme is the same kind of "home rule" constitutional provision (Cal. Const., Art. XI, § 7) found

inadequate by this Court in *Boulder. Birkenfeld* v. *City of Berkeley,* 17 Cal.3d 129, 140 (1976). In fact, the statutory provisions now relied upon by Berkeley *postdate* Berkeley's excursions into residential price-fixing by at least eight years. The adequacy of state authorization to confer a federal exemption to a federal policy is, of course, a federal question properly justiciable by this Court, the state court having foreclosed its opportunity to rule thereon. *See Town of Hallie,* supra, 105 S.Ct. at 1719 n.8; *Chambers* v. *Mississippi,* 410 U.S. 284, 290 n.3 (1973).

CONCLUSION

Congress mandated competition as the "polestar" by which all must be guided in making economic choices. *Lafayette* v. *Louisiana Power & Light Co.,* supra, at 406. At least in the absence of state direction or authorization, this "fundamental national policy" may not be subverted by municipal governments in their efforts to confer economic benefits on local political constituencies. Because the Berkeley Ordinance on its face conflicts with the most basic objective of the antitrust laws, the preservation of price competition, and lacks any express supportive state policy such as to invoke federalist exemption, the Ordinance is preempted and this Court should so hold.

DATED: August 1, 1985

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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

VS.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD.
Appellees.

On Appeal from the Supreme Court of the State of California

~~**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND**~~

BRIEF OF BERKELEY PROPERTY OWNERS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

The Berkeley Property Owners' Association hereby moves the Court to file the attached *amicus curiae* brief for the reasons set forth below.

1. Interest of Amicus Curiae

Amicus Curiae, Berkeley Property Owners' Association, is comprised of approximately six hundred owners of rental property in Berkeley, California. Together, the members own approximately six thousand units of rental housing. For the most part, the members each own between 4 and 10 units of rental property.

Of all the *amici curiae* filing briefs in this case, members of the Berkeley Property Owners' Association are the most directly affected by the absence of competition which has resulted from the Berkeley Rent Stabilization. Its members are forced to

participate in the price control scheme imposed by the ordinance. Failure to participate is severely punished. Cumulative penalties for non-registration are imposed every sixty days. Owners who fail to register are denied the annual general increases permitted since 1980 and may not obtain individual adjustments permitted by the ordinance. Tenants of unregistered units are permitted to unilaterally withhold rents until registration is completed. Moreover, the owners' ability to sell their property is seriously crippled by the law's refusal to permit present buyers of residential rental property from using increased mortgage costs as a justification for obtaining permission to raise rents.

2. Counsel understands that general consents have been given for the filing of *amici curiae* briefs in this case.

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TABLE OF CONTENTS

Page

Interest of *amicus curiae* 1

Summary of argument 1

I

The supremacy of the national policy of free competition must be reaffirmed in this case 4

A. The court has recognized the threat posed to the national policy of free competition by restraints on trade imposed by local government 4

B. The ordinance at issue directly restrains trade and thus conflicts with the national policy of free competition codified in the Sherman Act 6

1. The ordinance establishes a pervasive price fixing scheme, a per se violation of the Sherman Act 7

2. Berkeley's rental property owners are compelled to participate in the price fixing scheme 9

II

The California court's arguments advanced to justify overruling this court's decisions, which have placed municipal conduct within the reach of the Sherman Act and have condemned price-fixing as *per se* illegal, simply reiterated arguments heretofore rejected by this court and Congress 10

A. The cities of Lafayette and Boulder raised the precise arguments employed by the court below in rejecting the application of the Sherman Act to regulatory action. This court rejected those arguments then and must do so again 11

B. The arguments advanced by the court below were raised by local government advocates before congressional committees. Congress' refusal to adopt those points should be respected 12

TABLE OF CONTENTS

Page

C. The California Supreme Court unilaterally amended the Sherman Act by making legislative proposals rejected by the Congress applicable to California municipalities 13

III

The court is obliged to enforce the national policy of free competition. The fear that substantive due process will be resurrected by a decision invalidating Berkeley's law is unwarranted 14

IV

In the event the court determines that the *per se* rule is inapplicable, it should fashion a test requiring the city to prove that its ordinance is the least restrictive means of accomplishing its ends 16

Conclusion 17

TABLE OF AUTHORITIES CITED

Cases

Page

Arizona v. Maricopa County Medical Society, 457 U.S. 348 ..... 7, 12, 14
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 2, 5, 11
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 2, 5, 10, 13, 15, 16
Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 5
Cohen v. California, 403 U.S. 15 (1971) 15
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 2, 4, 5, 10, 12, 13
Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980) 10, 11
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 .... 3, 4
Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 6
Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta, 458 U.S. 141 6
Laird v. Nelms, 406 U.S. 797 (1972) 13
Lochner v. New York, 198 U.S. 45 (1905) 11, 14, 15
Lovell v. Griffin, 303 U.S. 444 (1938) 5
Michigan Canners & Freezers v. Agricultural Marketing & Bargaining Bd., ____ U.S. ____, 104 S.Ct. 2518 (1984) 6
Near v. Minnesota, 283 U.S. 697 (1930) 15
Owen v. City of Independence, 445 U.S. 622 (1980) 15
Rice v. Norman Williams Co., 458 U.S. 654, (1982) .. 3, 6, 7, 9
Schneider v. State, 308 U.S. 147 (1939) 6
Texas Industries v. Radcliffe Materials, 451 U.S. 630 (1981) 13
Town of Hallie v. City of Eau Claire, ____ U.S. ____, 105 S.Ct. 1713 2
United States v. Topco Associates, 405 U.S. 596 (1972) .. 5
Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 5, 16

TABLE OF AUTHORITIES CITED

Constitution

	Page
U.S. Constitution:	
Article IV, Section 2	14
Article VI, Section 2	1, 4, 6
Fourteenth Amendment	14

Statutes

15 U.S.C. § 1	passim

Other Authorities

H. Rept. 98-965	13
Berkeley Rent Stabilization Ordinance	7-10

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BRIEF ON THE MERITS

INTEREST OF *AMICUS CURIAE*

The interest of the Berkeley Property Owners' Association is set forth in the Motion to File *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

This significance of this case transcends questions about the proper application of the "state-action" doctrine, or the wisdom of rent control. The basic question presented is whether the Supremacy Clause of the United States Constitution, which binds every State judge to enforce the laws of the United States, should be enforced to strike down a local ordinance directly contravening a Congressional enactment and the national policy it embodies.

This Court will not resolve this appeal on a clean slate. Notwithstanding the state court's attempt to treat the question presented as unresolved by precedent, certain distinct, readily identifiable marks have been etched on the legal landscape. First, a national policy has been promulgated by Congress establishing a regime of free-competition, as essential to our economic freedoms as is the Bill of Rights to our personal liberties. *Community Communications Co. v. City of Boulder,* 455 U.S. 40, 56 n. 19 (1982), (hereinafter "*Boulder*"); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 110-11, (1980), (hereinafter "*Midcal*"); and *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 398 n. 16, (1978), (hereinafter "*Lafayette*").

Second, the law's reach encompasses both actions taken by private parties and those taken by state or local government, whether through regulation or through operation of monopoly public service. The reach of the law, however, is modified in two respects, one affecting the entity whose action has failed to comport with national policy, and the other affecting the actual restraint imposed.

Thus, in order to accomodate the federalist structure of our Republic, not all state or local governmental anti-competitive action must fall before the pre-eminent national policy. Action taken by the State or by one of its subdivisions would not conflict with the Sherman Act when taken pursuant to a clearly articulated and affirmatively expressed State policy to displace competition with regulation or monopoly public service as sovereign *Boulder, supra,* 455 U.S., at 51; *Midcal, supra,* 445 U.S., at 105; *Lafayette, supra,* 435 U.S., at 414. And, where State or municipal *regulation* of private parties is involved, the State, as sovereign, must actively supervise the regulation, even where a clearly articulated state policy to displace competition exists. *Town of Hallie v. City of Eau Claire,* ___ U.S. ___, 105 S.Ct. 1713, 1720, n.10. Under this framework, our dual system of government, encompassing both State and National sovereignty, coexists with the pro-competition goal of the Sherman Act.

Application of the anti-trust laws is also affected by the type of restraint imposed. Certain restraints have been deemed invalid

per se, relieving the plaintiff from the burden of proving the actual effect of the restraint. Among those restraints which have been condemned out-of-hand, price-fixing has drawn the greatest ire because, in our system of economic freedom, freedom to set the price at which the product or service sells, is the linchpin.

Contrary to the state court opinion below, this classification rests on more than economic predictability and ease of judicial administration. It rests largely on our accumulated experience that price-fixing cripples the ability of those restrained to offer their product or service as they deem best. Moreover, to the extent the sellers' ability to engage in non-price competition is compromised by the level at which prices are set, the consumer's freedom of choice is significantly compressed. The Court has recognized that State and local governmental price-fixing, when falling beyond the parameters of the state-action exemption, is subject to the *per se* rule and must yield to the national policy of competition.

In *Rice v. Norman Williams Co.,* 458 U.S. 654, 661 (1982), Justice Rehnquist explained that if an ordnance or statute contemplated conduct which was illegal *per se* and if it "places irresistible pressure on a private party to violate the antitrust laws in order to comply," that ordinance will be condemned under § 1 of the Sherman Act. The ordinance challenged here does place such pressures on owners of residential rental property in Berkeley.

The opinion below, and no doubt the City and its *amici* will advise the court of the dire consequences of a decision invalidating the ordinance. These arguments were addressed by the cities of Lafayette and Boulder in their briefs to this Court and were rejected at that time. Asked to respond specifically to *Boulder,* Congress only removed the threat of damages.

The parade of horribles that the City will present in support of the ordinance must be considered in the context of the probable impact of a decision voiding the local law. This Court has repeatedly cautioned that anti-competitive effect alone will not suffice to void a local ordinance. See, e.g. *Rice v. Norman Williams Co., supra,* 458 U.S. at 659; *Exxon Corp. v. Governor of*

Maryland, 437 U.S. 117, 129-133. Hence, reversal of the California court's decision will not harken a return to the type of substantive due process analysis exemplified by *Lochner v. New York*, 198 U.S. 45 (1905). The ruling sought by Appellants would only void naked restraints on competition, such as price-fixing, when imposed by a local government acting in the absence of a clearly expressed and articulated State policy to displace competition.

This Court has not hesitated to enforce the Bill of Rights to void local ordinances which restrict the personal freedoms protected by our federal Constitution. When the antitrust laws—the Bill of Rights safeguarding our system of free competition—are contravened by local ordinances, the Supremacy Clause compels affirmance of the national will.

I

THE SUPREMACY OF THE NATIONAL POLICY OF FREE COMPETITION MUST BE REAFFIRMED IN THIS CASE

A. The Court Has Recognized The Threat Posed To The National Policy Of Free Competition By Restraints On Trade Imposed by Local Government

The Sherman Act embodies the *national* policy of free competition, a policy designed and enforced to benefit the citizens of every town and city in the land. That pre-eminent economic policy must not be permitted to be sacrificed on the altar of parochial interests which may arise from time to time to stifle free competition.

The opinion below paid remarkably little deference to this national policy and the effect of its holding on that policy. Absent from the decision was any reference whatever to Justice Brennan's concerns which, by *Boulder*, had earned the allegiance of a majority of the Court:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the

> armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

435 U.S. at 408.

> In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

435 U.S. at 413.

> To permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws, . . . without furthering the policy underlying the *Parker* "exemption."

435 U.S. at 415.

In each case comprising the recent state-action trilogy of *Boulder*, *Midcal* and *Lafayette*, the Court has emphasized that "Antitrust laws . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms[,]" quoting *United States v. Topco Associates*, 405 U.S. 596, 610 (1972). *Boulder*, 455 U.S. at 56 n. 19; *Midcal* 445, U.S., at 110-11; *Lafayette*, 435 U.S., at 398 n. 16.

In reviewing local ordinances, this Court has shouldered the obligation of striking down acts of local government which restrict personal freedoms guaranteed by the Constitution or Congressional enactment. Thus, in furthering the national policy of free speech and expression, the Court has struck down restrictions on campaign financing which violated the national policies of free speech encouraging political debate; *Citizens Against Rent Control v. City of Berkeley* 454 U.S. 290 (1981); voided restrictions on soliciting on behalf of political—as opposed to charitable causes, *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); invalidated ordinances requiring licenses to speak, *Lovell v. Griffin*, 303 U.S. 444 (1938); and struck down ordinances which, through ostensibly aimed at litter-

ing, actually prohibited distribution of handbills, *Schneider v. State,* 308 U.S. 147 (1939).

If, as this Court has recognized, the antitrust laws are as vital to free trade in commerce as the first amendment is to free trade in ideas, the Supremacy Clause requires that ordinances which directly conflict with the national policy embodied in the Sherman Act must yield to Congress' mandate.

B. The Ordinance At Issue Directly Restrains Trade And Thus Conflicts With The National Policy Of Free Competition Codified In The Sherman Act

This Court has repeatedly held that when local law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' " the doctrine of pre-emption compels invalidation of the local law. *Michigan Canners & Freezers v. Agricultural Marketing & Bargaining Bd.,* ___ U.S. ___, 104 S.Ct. 2518, 2523 (1984) [citation omitted]. "The underlying rationale of the pre-emption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that 'interfere with or are contrary to, the laws of congress.' *Gibson v. Ogden,* 9 Wheat 1, 211 (1824)." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317 (1981). Thus, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of the Constitution provided that the federal law must prevail.' *Free v. Bland,* 369 U.S. 663, 666." *Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta,* 458 U.S. 141, 153.

Justice Rehnquist's discussion of the pre-emption doctrine in the antitrust context in *Rice v. Norman Williams, supra,* should have put to rest the notion that local governmental action amounting to a *per se* violation of the antitrust laws will survive this Court's scrutiny.

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.

458 U.S. at 659, 661.

1. The Ordinance Establishes A Pervasive Price Fixing Scheme, A Per Se Violation of The Sherman Act

The ordinance must be examined in the light cast by numerous decisions in which this Court "has not wavered in [its] enforcement of the *per se* rule against price fixing," recognizing that the rule "is grounded on faith in price competition as a market force and not on a policy of low selling prices at the price of eliminating competition." *Arizona v. Maricopa County Medical Society, supra,* 457 U.S. at 348. [citation omitted].

Examining the ordinance to determine whether a conflict exists, we find that the ordinance does, in fact, mandate the elimination of price competition among owners of rental property. Prices are strictly regimented. Once each year, pursuant to section 11, the Board authorizes a general increase applicable to all owners for the forthcoming year. Regulation 1103 et seq. Section 12 allows owners to seek individual rent increases. The incentive to seek such increases is dampened considerably by the regulations, however. Regulation 1274 limits any monthly increase to the lesser of 15 percent or $50.00 per calendar year per unit. On the other hand, an owner must pay the Board a filing fee of $120.00 for the first unit and $60.00 for each additional unit for which an increase is sought. Regulation 1203. The legal costs of preparing the petition are not recoverable. Regulation 1265 (4).

Other disincentives to rent adjustments also exist. The Regulations presume that the actual profit realized in 1979 resulted in a fair return for the owner. No allowance for inflation is made. Regulations 1264, 1265, 1275. Mortgage principal and interest payments are *not* to be considered in computing the net operating income. (Regulation 1265) except that increases in debt service may be considered if sustained during the period 1978-1980. Regulation 1276.

Although rent increases are permitted for capital improvements, no incentive exists to make such improvements. The increases are limited to the actual cost of the improvement plus imputed interest over an amortization period set by the Board. At the end of that period, the rent must be reduced by the amount of the increase allowed to offset the cost of the improvement. The owner is not permitted to earn a profit on that improvement. Regulation 1267.

Perhaps, the greatest impediment to price adjustments, however, is revealed by reading the current ordinance with its predecessors, Measure I and Ordinance 5212. Measure I was enacted in November, 1978 and required owners to lower rents to reflect property tax savings resulting from the passage of California's Proposition 13 the prior June. Ordinance 5212, enacted in November, 1979, limited increases to five percent pending the enactment of the present law which was enacted in June, 1980. These laws were self-enforcing; there was no municipal board established until the summer of 1980.

As the ordinance is presently applied by the Board, owners are only allowed to take advantage of the Section 11 general adjustments and Section 12 individual adjustments if the current rent charged is in compliance with the ordinance. Because the current ordinance, however, incorporates the 1978 and 1979 laws, the many owners who failed to reduce rents in 1979 were not permitted to take advantage of the general adjustments allowed by the Board commencing in 1981. For those owners who failed to lower rents in 1979, the amount which should have been charged in 1979 under Measure I becomes the permanent legal rent in perpetuity until refunds are made of *all* sums collected above that amount. No statute of limitations has been applied. Even after refunds are made, the rent is fixed at the 1979 level; only general adjustments enacted by the Board subsequent to the date of that refund may be taken. Hence, owners who did not reduce rents in 1979 are permanently barred from recouping the annual adjustments allowed prior to the refund. For many units in Berkeley, the present legal rent is that which should have been set in 1979.

In addition to the price fixing, the ordinance severely restrains the purchase and sale of rental property. Regulation 1276 pre-

vents one who purchased Berkeley rental property after June, 1980 from recouping through increased rent the difference between the prior and current mortgage payments. Even if the prior owner held the property free and clear, the new owner is barred from treating the mortgage payments as an expense. Section 12 (d), (e); Regulation 1276. Ostensibly designed to thwart speculation, these provisions basically preclude the purchase and sale of rental property in Berkeley.

2. Berkeley's Rental Property Owners Are Compelled To Participate In The Price Fixing Scheme

Justice Rehnquist's pre-emption analysis would also void ordinances if "irresistible pressure is placed on a private party to violate the antitrust laws in order to comply with the [ordinance]." *Rice v. Norman Williams' supra,* 458 U.S. at 661. Such pressure exists here. Section 8 of the ordinance requires all owners to register, setting forth the rental history of each unit on the property since June 6, 1978 (two years before the law was enacted) as well as other information. This apparently innocuous provision is the cement which binds the owner to the price-fixing scheme.

Each year the Rent Stabilization Board authorizes an across-the-board percentage increase for all units in the city. Section 11. Owners who fail to register are not entitled to these increases. If such increases are taken by an unregistered owner, they will be forfeited by the Board in response to a tenant's petition. To further ensure registration, owners are barred from obtaining individual rent adjustments if they have not registered. Section 12.

In addition, a tenant of an unregistered owner may withhold his entire rent until the rental unit is registered in accordance with the law. Section 15(a)(2).

Hence, owners of unregistered units are forced, under the threat of massive rollbacks, to maintain their rents at the pre-rent control level. Owners of registered units are forced to toe the line and limit their increases to those allowed by the Board. Their registration statements will reveal any inconsistency, subjecting them to rent withholding and refund orders.

Most significantly perhaps, failure to register permits the tenant to successfully resist any unlawful detainer action, regardless of its basis (non-payment of rent; destruction of property; material violation of the lease) on the ground that the owner has not complied with the registration provisions of the ordinance. Section 13(c).

Penalties are also imposed on owners of unregistered units. Under Section 8, the registration fee—paid only by the owner—must be paid by September 1 of each year. That fee for 1985-1986 has been doubled to $60.00 per unit per year. In the event the owner fails to pay, an amount equal to the fee is added to his bill every sixty days.

This brief review of the ordinance compels the finding that irresistible pressure is indeed placed on rental property owners to participate in the price fixing scheme under review.

II

THE CALIFORNIA COURT'S ARGUMENTS ADVANCED TO JUSTIFY OVERRULING THIS COURT'S DECISIONS, WHICH HAVE PLACED MUNICIPAL CONDUCT WITHIN THE REACH OF THE SHERMAN ACT AND HAVE CONDEMNED PRICE-FIXING AS *PER SE* ILLEGAL, SIMPLY REITERATED ARGUMENTS HERETOFORE REJECTED BY THIS COURT AND CONGRESS

In *Boulder,* this Court granted a Petition for Certiorari to reverse a decision rendered by the majority of a federal court of appeals which had seemed intent on overruling this Court's *Lafayette* decision. *Community Communications Co. v. City of Boulder,* 630 F.2d 704 (10th Cir. 1980). Although explicitly recognizing that "we are here concerned with City action in the absence of any regulation whatever by the State of Colorado." 630 F.2d at 707, the Tenth Circuit nevertheless held that a state policy to displace competition existed. And, notwithstanding the *Lafayette* plurality's rejection of the governmental-proprietary dichotomy, the Tenth Circuit majority held that *Lafayette* only applied to proprietary conduct.

Here, the California Supreme Court has, in effect, followed the Tenth Circuit's refusal to heed this Court's precedents. The length of its opinion reflects the extent to which the majority below was required to go to negate this Court's prior teachings.

The state court decision explicitly recognized this Court's rejection of the governmental-proprietary dichotomy. Nonetheless, it fashioned a test which, in effect, automatically exempted from successful attack all local health and welfare ordinances debatably related to the legitimate exercise of the police power. 209 Cal.Rptr. at 707-708, 709.[1]

A. The Cities Of Lafayette And Boulder Raised The Precise Arguments Employed By The Court Below In Rejecting The Application Of The Sherman Act To Regulatory Action. This Court Rejected Those Arguments Then And Must Do So Again

The opinion below essentially reiterated arguments previously rejected by both this Court and Congress. In *Lafayette* and *Boulder* this Court explicitly rejected the very same contentions that the antitrust laws and municipal regulation could not coexist.

The cities in *Lafayette* argued that antitrust liability "will have a chilling effect upon local decision-making and paralyze the functions of local government." Pet. Brf. No. 76-864 at 7. Although forcefully reargued in Justice Stewart's dissent (435

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[1] The two exceptions to this test are illusory. First, ordinances which are improperly motivated or the product of official misconduct or conflict of interest are actionable. Even absent the Sherman Act, however, local legislation can be voided on proof of misconduct and conflict of interest. Second, while the opinion states that anti-competitive ordinances may be overturned if the plaintiff demonstrates that the city's purposes could be achieved as effectively by means less intrusive on federal antitrust policies (213 Cal.Rptr. at 707-708), it appears that if such a showing can be made only through the introduction of extensive evidence at trial, the ordinance will be upheld and an evidentiary hearing precluded. Thus, finding that plaintiffs in the instant case would require such a showing, the Court summarily upheld the ordinance. 209 Cal.Rptr. at 709.

U.S. at 397-400), this contention failed to carry a majority of the Court and was specifically rejected by the plurality opinion. 435 U.S. at 416-417.

The City of Boulder and its *amici* repeated Justice Stewart's concerns in their briefs to the Court. Foreshadowing the specific points the California court would raise several years later, Boulder argued that reversal of the Tenth Circuit decision would "Force federal courts who strictly apply the Sherman Act to enjoin legitimate local governmental regulation." Resp. Br. No. 80-1350, at 37. The City also contended that "subjecting cities to judicial antitrust review would effectively turn back the clock to the era of substantive due process when every legislative act of government was subjected to endless economic 'hair-splitting' by the federal courts." *Id.* at 37 n.39. Finally, the city noted that other remedies were available to challenge wrongful municipal conduct, noting that unauthorized or criminal conduct is actionable. *Id.* at 38 n.42.

A majority of the Court rejected the argument:

> Respondents argue that denial of the *Parker* exemption in the present case will have serious adverse consequences for cities, and will unduly burden the federal courts. But this argument is simply an attack upon the wisdom of the long-standing congressional commitment to the policy of free markets and open competition embodied in the antitrust laws.

455 U.S. at 56.

B. The Arguments Advanced By The Court Below Were Raised By Local Government Advocates Before Congressional Committees. Congress' Refusal To Adopt Those Points Should Be Respected

When parties have disputed this Court's statutory construction, they have been advised to seek help in the halls of Congess. Thus, in *Arizona v. Maricopa County Medical Society, supra,* the Court advised the unsuccessful defendants that their "arguments against application of the *per se* rule in this case therefore are better directed to the Legislature. Congress may consider the exception

that we are not free to read into the statute." 457 U.S. at 354-355 *Cf. Texas Industries v. Radcliffe Materials,* 451 U.S. 630 (1981)

Following this advice, local governments and their allies lobbied for legislation modifying the *Boulder* decision. As the House Judiciary Report (No. 98-965) reveals, however, local governments sought much more than relief from the threat of money damages. Several witnesses before the committee argued that the rule of reason was "entirely inappropriate in the context of municipal conduct where there is every reason to anticipate that a local government defendant may have acted for reasons of the public health, safety and welfare." H. Rept. 98-965 at 16. Testimony was also received urging abolition of the *per se* rule in the municipal antitrust context. *Id.* at 16 n. 25.

Six bills were introduced in the 98th Congress addressing the subject of municipal antitrust liability. Two of the proposals were remarkably similar to the test adopted by the court below. Under H.R. 3688, a court would have determined whether the local government's objective could have been achieved in a manner less restrictive of the Federal interest in competition. *Id.* at 16. Under another proposal, H.R. 5992, the antitrust laws would not have applied to actions of local government "reasonably undertaken to protect or provide for the public health, safety or welfare." *Id.* at 17.

Neither of these proposals was enacted; Congress limited its modification of *Lafayette* and *Boulder* to the question of damages, limiting plaintiffs to injunctive relief. Local Government Antitrust Act P.L. 98-544. Congress' refusal to further modify *Boulder* and *Lafayette* should be viewed as a ratification of this Court's holdings and, therefore, respected. *Laird v. Nelms,* 406 U.S. 797, 802 (1972).

C. The California Supreme Court Unilaterally Amended The Sherman Act By Making Legislative Proposals Rejected By The Congress Applicable to California Municipalities

Undaunted by Congress' refusal to alter the substantive holdings of *Lafayette* and *Boulder,* the California Supreme Court, in effect, enacted the very legislation Congress had rejected. Under the banner of protecting local legislative action from judicial

interference, the state court invaded the province of the national legislature and amended the Sherman Act as it applied to California citizens allegedly harmed by local government anti-competitive conduct.

Adopting the doctrine that municipal government can do no wrong, the court below stole a page from John Calhoun's nullification theory and declared that at least one act of the national legislature shall have no effect in California. In effect, this decision did no less than violate both the Supremacy Clause and Article IV, Section 2 which states, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States." Neither the State of California nor the residents of Berkeley have seceded from the Union. The economic liberties protected by the Sherman Act belong to them as well.

III

THE COURT IS OBLIGED TO ENFORCE THE NATIONAL POLICY OF FREE COMPETITION. THE FEAR THAT SUBSTANTIVE DUE PROCESS WILL BE RESURRECTED BY A DECISION INVALIDATING BERKELEY'S LAW IS UNWARRANTED

The fear of a return to *Lochner* era judicial interference with local regulation is unwarranted. We deal not with the amorphous due process clause of the Fourteenth Amendment. Rather, the Court in this case is asked to strike down a price fixing scheme which runs directly counter to decades of judicial decisions applying a Congressional enactment.

The effect of the price fixing parallels the effect of a private agreement. Prices are fixed so low that owners can provide only minimal services to renters and an owner's ability to tailor his property to the needs of renters, who may be willing to spend more than the rates set by the Board, is eliminated. Like the Arizona doctors described in *Arizona v. Maricopa Medical Society, supra*, owners who pay special attention to their properties are not rewarded for their extra efforts which, while often intangible, make a particular rental property distinctive. Small owners, who have relied on personal service, and often deferred increases prior

to rent control, find rents basically frozen and cannot remain in the market.

The state court opinion maintains that nothing suggests that the price control on Berkeley will be permanent, noting that may cease when the vacancy level exceeds 5%. Section 6q. This assumes that Berkeley's tenants, prospering under rent control, will voluntarily decide to abandon it. The conclusion also ignores the fact that price control invariably limits market entry and causes some in the market to withdraw, thereby guaranteeing a low vacancy rate for the indeterminate future.

In *Owen v. City of Independence,* 445 U.S. 622, 649 (1980), the Court explained its role in reviewing laws which allegedly violate the federal Constitution or statutes:

> But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the City's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

Lines must be drawn somewhere. Limitations exist on the extent to which personal freedoms may be constricted by local government action and this Court has developed tests for judging suspect ordinances. Thus, in free speech cases, laws which directly restrain speech because of the content of that speech are deemed *per se* illegal; no balancing is done, the law is voided. *cf. Cohen v. California,* 403 U.S. 15 (1971); *Near v. Minnesota,* 283 U.S. 697 (1930).

Price fixing in the economic sphere is analogous to such content-based direct restraints on speech. Price fixing is voided without any balancing whatever. The *Lochner* problem is in reality the product of the state court's own test. Unwilling to apply the antitrust laws as they have been interpreted to date, the opinion below discarded the *per se* rule and substituted a

standardless test which invited the very second-guessing the opinion attacked.

The court's opinion below was also predicated on the belief that any egregious fault with the law could be solved in the voting booth. The *Lafayette* plurality expressly rejected the view that the political process is an adequate safeguard against the enactment of parochial anti-competitive economic policy by local government acting in the absence of state policy. Since Berkeley's residents, by virtue of their membership in the National Union, have been granted the rights of free competition, those rights should not be subject to deprivation by majority vote at the local level.

IV

IN THE EVENT THE COURT DETERMINES THAT THE *PER SE* RULE IS INAPPLICABLE, IT SHOULD FASHION A TEST REQUIRING THE CITY TO PROVE THAT ITS ORDINANCE IS THE LEAST RESTRICTIVE MEANS OF ACCOMPLISHING ITS ENDS

If the Court concludes that a *per se* test is not the proper vehicle to judge alleged municipal violations of the antitrust laws, we submit that the Court should adopt the test employed for non-content based restrictions in first amendment jurisprudence. Under this test, the local government would bear the evidentiary burden of proving that its restraint on competition was the least restrictive means of furthering a significant governmental interest. *See, e.g. Village of Schaumberg v. Citizens for a Better Environment,* 444 U.S. 620 (1980). Because economic freedoms of such national significance are involved, it is crucial that strict scrutiny be applied to such ordinances and the burden be placed on the city to justify its restraint.

Furthermore, and just as critical, the right to challenge a governmentally imposed direct restraint should not be limited to a facial challenge mounted contemporaneously with the law's enactment. Those challenging the ordinance must be given the opportunity, if they desire it, to wait until the actual anti-competitive effect of the restraint becomes visible. Limiting

challenges to facial attacks on the law will preclude any inquiry into its actual enforcement.

CONCLUSION

The citizens of Berkeley have the right to enjoy the fruits of free competition which are guaranteed them by the Sherman Act. Ostensibly acting to preserve the separation of powers between the judiciary and local legislature, the California Supreme Court has invaded the province of the Congress and nullified any application of the Sherman Act to California municipalities. Decrying second-guessing of legislative decrees, the court below substituted its own judgment for that of the national legislature. Restoring the proper balance between Berkeley's law-makers and the Congress and restoring to Berkeley's citizens the economic freedoms which the Sherman Act protects, mandates a decision enjoining the further enforcement of Berkeley's Rent Stabilization Ordinance.

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No. 84-1538

In the Supreme Court of the United States

October Term, 1984

ALEXANDRA FISHER, et al.,

Plaintiffs and Appellants,

v.

THE CITY OF BERKELEY, et al.,

Defendants and Appellees.

AMICUS CURIAE BRIEF OF THE CITIES OF SANTA MONICA, LOS ANGELES, PALM SPRINGS, WEST COVINA, WEST HOLLYWOOD, CAMARILLO, OXNARD, AND CATHEDRAL CITY IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether local police power legislation, valid under state law and the Fifth and Fourteenth Amendments, conflicts with or is subject to the federal antitrust laws.

TOPICAL INDEX

Page

Question Presented i
Interest Of Amici 1
Summary Of Argument 2
1. The Berkeley Law Is Exempt Under The State Action Test 3
2. The Berkeley Law Is Not Preempted 3
3. Traditional Antitrust Analysis Is Inappropriate 3
Introduction 4

Argument

I.

Municipal Rent Controls In California Are Exempt From The Antitrust Laws Because Of Clearly Articulated And Affirmatively Expressed California Housing Policy 5
A. California Housing Policy Contemplates Local Rent Control 5
1. Cities Are Under A State Mandate To Provide For Adequate Housing 6
2. Rent Control Is A Recognized And Foreseeable Means Of Meeting State Requirements 8
B. The Decision Should Be Affirmed Under The Hallie Test 12

II.

The Berkeley Rent Control Law Is Not Preempted By The Sherman Act 14
A. The Antitrust Laws Were Not Intended To Preclude Local Police Power Regulation 14
B. A Municipal Regulation Is Preempted By The Sherman Act Only If It Mandates Conduct By Private Parties Which In All Cases Violates Federal Antitrust Law 17

III.

Principles Of Federalism Require Rejection Of The Per Se Rule In Assessing Police Power Regulations 18

A. The Per Se Rule Was Adopted For Traditional Private Market Agreements And Fails To Achieve Any Salutary Purpose Respecting Governmental Health And Welfare Regulations 18

B. The Per Se Rule Is Inapplicable Because Berkeley's Rent Control Law Does Not Constitute "Price-Fixing" 20

C. The Per Se Rule Does Not Apply In Cases Of First Impression 23

IV.

Principles Of Federalism Require Modification Of The Rule Of Reason To Accommodate Local Police Power Regulations 25

A. Commerce Clause Cases Provide An Appropriate Framework Of Analysis When Balancing The Benefits Of Local Regulations Against Their Impact On Commerce 26

B. Rent Control Does Not Unreasonably Burden Commerce 28

Conclusion 29

TABLE OF AUTHORITIES CITED

Cases Page

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Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 24

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) 15

Berman v. Parker, 348 U.S. 26 (1954) 5

Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976) 10, 13, 19, 29

Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) 23

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 17, 18, 20, 21, 22

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 16, 22

Capital Telephone Co. v. New York Telephone, 750 F.2d 1154 (2d Cir. 1984) 6

Cardio-Medical Ass'n v. Crozer-Chester Medical Center, 721 F.2d 68 (3d Cir. 1983) 28

City of Camarillo v. Spadys Disposal Service, 144 Cal. App. 3d 1027, 193 Cal. Rptr. 22 (1983) 8

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 12, 16

Construction Ind. Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) *cert. denied* 424 U.S. 934 29

Continental Oregon Co. v. Union Carbide Corp., 370 U.S. 690 (1962) 22

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 24

Cooley v. Board of Wardens, 12 How. 299 (1852) 27

Cotati Alliance for Better Housing v. City of Cotati, 148 Cal. App. 3d 280, 195 Cal. Rptr. 825 (1983) 8, 10

Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., 366 U.S. 127 (1961) 15
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 17
Ferguson v. Skrupa, 372 U.S. 726 (1963) 26
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Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 15
Hillsborough County v. Automated Medical Laboratories, Inc., ___ U.S. ___, 85 L. Ed. 2d 714 (1985) 14
Hines v. Davidowitz, 312 U.S. 52 (1941) 14
Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976) 27
Housing Authority v. Dockweiler, 14 Cal. 2d 437, 94 P.2d 794 (1939) 6
Huron Cement Co. v. Detroit, 362 U.S. 440 (1960) 26
Jetro Cash & Carry Ent. v. Food Distribution Center, 569 F.Supp. 1404 (E.D. Pa. 1983) 23-24
Joseph Seagram & Sons v. Hostetter, 384 U.S. 35 (1966) 17
Knight v. Halsthammar, 29 Cal. 3d 46, 171 Cal. Rptr. 704, 633 P.2d 288 (1981) 6
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 28
Mandeville Island Farms v. American Crystai Sugar Co., 334 U.S. 219 (1948) 27
Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1980) 6
Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925) 5
Morgan v. Division of Liquor Control, 664 F.2d 353 (2d Cir. 1981) 21
Nash v. City of Santa Monica, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984) *appeal dismissed* 84 L. Ed. 207 12
New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978) 27

Olsen v. Smith, 195 U.S. 332 (1904) 22
Parker v. Brown, 317 U.S. 41 (1943) 2
Philadelphia v. New Jersey, 437 U.S. 617 (1978) 28
Pike v. Bruce Church, 397 U.S. 137 (1970) 28, 29
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 17
Raymond Motors Transp. Co. v. Rice, 434 U.S. 429 (1978) 29
Rice v. Norman Williams Co., 458 U.S. 654 (1982) 3, 17, 20, 21
Russell v. United States, 53 U.S.L.W. 4652 (June 3, 1985) 28
Santa Monica Airport Ass'n v. City of Santa Monica, 481 F.Supp. 927 (C.D. Cal. 1979) *aff'd* 659 F.2d 100 (9th Cir. 1981) 19
Santa Monica Pines v. Rent Control Board, 35 Cal. 3d 858, 201 Cal. Rptr. 593, 679 P.2d 27 (1984) 10, 13
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 145 (1951) 18, 20, 21
Snyder v. Massachusetts, 291 U.S. 97 (1934) 22
Southern Motor Carriers Rate Conference v. United States, 471 U.S. ___, 85 L. Ed. 2d 36 (1985) 13, 16, 17-18
State of Missouri v. National Organization for Women, 620 F.2d 1301 (8th Cir. 1980) 15
Town of Hallie v. City of Eau Claire, ___ U.S. ___, 105 S.Ct. 1713 (1985) 2, 5, 11, 12, 13
Tripoli Company v. Wella Corporation, 425 F.2d 932 (3rd Cir. 1970) 15
United Mine Workers v. Pennington, 381 U.S. 657 (1968) 15
United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 25
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 5
Village of Euclid v. Ambler, 272 U.S. 365 (1926) 9
White Motor Co. v. United States, 372 U.S. 253 (1963) 23

Statutes

United States Code
Title 15, Section 35 4
Title 15, Section 3601 6
Title 42, Section 1441 6
District of Columbia Rent Control Act of 1973, 87 Stats. 623 (uncodified) 16
56 Stat. 23 (1942) 16
3 C.F.R. 602 (1971) 16

California Government Code
§6250 et seq. 13
§54950 et seq. 13
§65302 6
§65580 ..... 6, 7
§65580(d) 8
§65581(b) 6
§65581(c) 8
§65583 7
§65583(c) 9, 13
§65584 7
65587 7
§65589 ..... 10, 11
§65589(b) 10
§65755(a) 7
California Health & Safety Code
§1518 11
§33250 6
§50002 6
§50202 11
California Stats. ch. 1691 (1984) 6

Constitutions

United States Constitution
Fifth Amendment ..... i, 4, 19
Fourteenth Amendment ..... i, 4, 19
California Constitution
Article XI, Section 7 ..... 5, 10

Article XIIIA 9
Article XIIIB 9
Article XXXIV 9

Rules

Supreme Court Rule 36.4 1

Other Authorities

A Proposed Model of the Sovereign/Proprietary Distinction, 133 U. Pa. L. Rev. 661, 679-80 (1985) 22, 25
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No. 84-1538

In the Supreme Court of the United States

October Term, 1984

ALEXANDRA FISHER, et al.,

Plaintiffs and Appellants,

v.

THE CITY OF BERKELEY, et al.,

Defendants and Appellees.

AMICUS CURIAE BRIEF OF THE CITIES OF SANTA MONICA, LOS ANGELES, PALM SPRINGS, WEST COVINA, WEST HOLLYWOOD, CAMARILLO, OXNARD, AND CATHEDRAL CITY IN SUPPORT OF APPELLEES

INTEREST OF AMICI

The California cities of Santa Monica, Los Angeles, Palm Springs, West Covina, West Hollywood, Camarillo, Oxnard and Cathedral City, submit this brief pursuant to Supreme Court Rule 36.4 as amici curiae in support of Appellees and urge that the Berkeley Rent Control Ordinance be upheld and the judgment below affirmed. Each amicus has adopted rent controls or other police power regulations that would be affected by this Court's decision.

SUMMARY OF ARGUMENT

This facial antitrust case presents two main issues:

1. Whether California rent control ordinances are exempt from antitrust scrutiny under *Parker v. Brown*, 317 U.S. 41 (1943), and *Town of Hallie v. City of Eau Claire*, 471 U.S. ___, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985).

2. Whether the Berkeley rent control law on its face conflicts with Section 1 of the Sherman Act. This preemption analysis requires an examination of whether traditional antitrust approaches, such as the *per se* rule, are applicable to municipal police power legislation.

The California Supreme Court employed preemption principles at the threshold and, finding no conflict, upheld the law without reaching the exemption question. Amici contend that the Berkeley rent regulation and similar legislative acts not involving municipal market participation or combination with private parties should be upheld under both preemption and exemption approaches. Municipal antitrust analysis should respect accepted principles of federalism, promote speedy and efficient judicial review, and harmonize with other tests used to measure local laws in light of the Due Process, Equal Protection, and Commerce Clauses.

In *Hallie*, this Court refrained from requiring explicit authorization for particular anticompetitive municipal conduct in order to avoid "deleterious and unnecessary consequences" (*Id.* at 85 L. Ed. 2d 32): infringing local authority over basic land use issues, chilling legitimate attempts to experiment with solutions to complex social problems, and embroiling the federal courts in the interpretation of state statutes. This policy of restraint requires affirmance of the California Supreme Court's finding that there is no conflict between the Berkeley regulation and the antitrust laws. The novel application of antitrust law advocated by appellants would deprive municipalities of traditional and salutary tools for dealing with local land use and economic matters, and should be rejected by this Court.

1. The Berkeley Law Is Exempt Under The State Action Test.

In response to a severe statewide housing shortage, the California Legislature has required cities to plan for the provision of adequate affordable housing opportunities for all segments of the community. Cities must submit "Housing Elements" for state approval containing programs to meet statutory requirements. Rent control ordinances are foreseeable, practical, and recognized means of meeting these municipal obligations. Thus, even if there were a conflict in the abstract between rent control and the Sherman Act, this Court should rule that Berkeley's law is exempt because it furthers clearly articulated state policy.

2. The Berkeley Law Is Not Preempted.

The court below correctly decided that the Berkeley ordinance did not conflict with the Sherman Act because it does not require landlords to engage in anticompetitive activity and does not frustrate antitrust policy. *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982). Indeed, appellants failed to show any of the elements of a Sherman Act violation—an agreement, an effect on commerce, or an unreasonable restraint of trade. Moreover, Congress never intended that the antitrust laws would preclude local police power regulations.

3. Traditional Antitrust Analysis Is Inappropriate.

The *per se* rule, developed to deter private "price-fixing" agreements, would effectively prohibit local legislatures from formulating adequate responses to community problems. It would also preclude courts from using customary balancing approaches appropriate to social and economic cases. The rule of reason, also developed in the context of determining private business antitrust liability, should not be mechanically applied for the same reasons.

The California Supreme Court proposed a standard based on commerce clause cases, which is sufficiently flexible to

accommodate the interests of local government in promoting the public interest, yet has sufficient "teeth" to guard against improperly motivated municipal conduct that undermines the objectives of the federal antitrust laws. Amici urge this Court to either approve that test or adopt a similar approach allowing local governments to fulfill their responsibility to protect the public welfare.

INTRODUCTION

Within the American political system, cities are the closest layer of government to individual citizens. The responsibility for many social problems such as a shortage of affordable rental housing falls on municipal governments first and foremost. Federal and state housing policy encourages the provision of decent housing for all citizens. However, citizens expect (and in California, state law requires) local governments to adopt specific policies and implement actual solutions.

For decades state and federal courts have efficiently tested local land use ordinances for compliance with the requirements of the Fifth and Fourteenth Amendments. Strict judicial scrutiny of these regulations under federal antitrust laws neither achieves Congress' objective nor promotes the administration of justice. Mechanical application of antitrust rules developed in other contexts can only disable cities attempting innovative responses to complex contemporary problems.

Although the Local Government Antitrust Act of 1984 (15 U.S.C. Section 35) relieves potential catastrophic consequences in future cases, the spectre of standardless judicial oversight of the political process remains. Traditional antitrust scrutiny, intended to protect the consuming public, is appropriate where cities are acting as market participants. However, where cities are legislating to protect the public health and welfare, balancing the competing needs of various segments of the community, rigid antitrust scrutiny is neither appropriate nor required by the Sherman Act.

ARGUMENT

I.

MUNICIPAL RENT CONTROLS IN CALIFORNIA ARE EXEMPT FROM THE ANTITRUST LAWS BECAUSE OF CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED CALIFORNIA HOUSING POLICY.

Subsequent to the decision below, this Court clarified the contours of state-action immunity. *Town of Hallie v. City of Eau Claire,* 471 U.S. ___, 85 L. Ed. 2d 24 (1985). Since rent control was contemplated and foreseeable by the California legislature as a result of its clearly articulated and affirmatively expressed affordable housing policy, the Berkeley Ordinance is exempt under *Hallie.*

In California, the police power is reserved to cities by Article XI, Section 7 of the California Constitution. Unless an area is preempted by general state law, a city possesses the power to legislate broadly respecting the health, safety, and welfare of its citizens. The police power is elastic, intended to accommodate changing conditions and problems. *See Miller v. Board of Public Works,* 195 Cal. 477, 234 P. 381 (1925). *Accord, Berman v. Parker,* 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). Under the California Constitution, the Legislature need not specifically authorize the exercise of the police power respecting every area of municipal concern. Construing the antitrust laws to require the legislature to do so would destroy delicate allocations of power established by the state constitution.

A. California Housing Policy Contemplates Local Rent Control.

Consistent with constitutional constraints, the legislature frequently requires local governments to plan for the needs of their citizens and to implement solutions to a variety of social problems. The housing statutes exemplify the cooperative roles of state and local government. An examination of "the broad regulatory scheme, state judicial

decisions and recent legislation" (*Capital Telephone Co. v. New York Telephone,* 750 F.2d 1154, 1160 (2d Cir. 1984), *cert. denied* 85 L. Ed. 2d ___ (1985)) reveals that local rent controls further state housing policy.

1. Cities Are Under a State Mandate to Provide for Adequate Housing.

In California, "the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order." California Government Code Section 65580. This state goal is declarative of federal policy. California Health & Safety Code Section 50002; 15 U.S.C. Section 3601;[1] 42 U.S.C. Section 1441. The State's housing policy essentially promotes affordable housing opportunities; the need to provide persons of restricted income with basic housing has long been recognized by the California Legislature and courts. *See* California Health & Safety Code Section 33250; Cal. Stats. ch. 1691 (1984); *Housing Authority v. Dockweiler,* 14 Cal.2d 437, 450, 94 P.2d 794 (1939); *Knight v. Halsthammar,* 29 Cal.3d 46, 53, fn.3, 171 Cal. Rptr. 707, 623 P.2d 288 (1981); *Marina Point, Ltd. v. Wolfson,* 30 Cal.3d 721, 743, 180 Cal. Rptr. 496, 640 P.2d 115 (1982).

All California cities must adopt general plans with mandatory elements which address particular local concerns, e.g., transportation, circulation, land use, public safety, housing. California Government Code Section 65302. In 1980, the legislature adopted especially detailed requirements for housing elements; municipalities must "prepare and implement housing elements which, along with federal and state programs, will move toward attainment of the state housing goal." California Government Code Section 65581(b).

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[1]"The Congress finds and declares that . . . there is a shortage of adequate and affordable housing throughout the Nation, especially for low- and moderate-income and elderly and handicapped persons." 15 U.S.C. Section 3601(a).

Cities must act to meet the needs and achieve the goals identified in their plans. Each housing element "shall make adequate provision for the existing and projected needs of all economic segments of the community." California Government Code Section 65583. A regional council of governments determines, based on projections prepared by the State, the existing and projected housing needs for the region and each local jurisdiction's fair share of the region's affordable housing opportunities. California Government Code Section 65584. Local governments must design, schedule, and execute programs to preserve and produce housing. *See generally,* Longtin, *California Land Use Regulations* (1985 Supp.) at 15-16.

The housing element statutes throughout, particularly Government Code Sections 65580 and 65583, contemplate that cities must provide housing for low- and moderate-income persons. The legislative mandate that local governments use their powers to implement the state housing goal is fortified with severe penalties for cities that do not adopt adequate housing elements.[2] The housing element must be submitted to the State Department of Housing and Community Development for review prior to adoption or amendment. California Government Code Section 65583. Judicial review of the adequacy of the housing element is available pursuant to Section 65587.

Berkeley's Housing Element identifies the City's housing needs (as determined by the regional council of governments); expresses goals and policies consistent with state housing goals; and establishes quantified objectives and scheduled programs. Accordingly, the Rent Control Ordinance addresses the City's housing crisis and advances its affordable housing policies (Sections 2-3, App. G at A-110-12).

The California Legislature appreciates that "each locality is best capable of determining what efforts are required by

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[2]*See, e.g.,* California Government Code Section 65755(a) (the state may suspend cities' authority to issue building permits, grant variances, or subdivision approvals if the housing element is inadequate).

it to contribute to the attainment of the state housing goal, provided such determination is compatible with the state housing goal and regional housing needs." California Government Code Section 65581(c). The Legislature specified that "local . . . governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community." California Government Code Section 65580(d). *See also City of Camarillo v. Spadys Disposal Service,* 144 Cal. App. 3d 1027, 1031, 193 Cal. Rptr. 22, 24 (1983) (municipalities require "the flexibility to adapt statewide directives to local circumstances").

The statutes requiring cities to prepare and implement housing elements were not intended to grant new powers to cities or take away powers they already have; they require cities to use their existing powers and focus them upon the state-mandated goal of meeting the housing needs of all economic segments of the community.

2. Rent Control Is A Recognized And Foreseeable Means Of Meeting State Requirements.

The constraints facing municipalities when complying with state requirements are relatively immutable. The shortage of land and the inability of existing infrastructure to support population density impose serious limitations.

> In the last ten years urban areas in California have begun to find essentially all vacant land filled, with little or no vacant space for the installation of additional housing. In many of California's largest cities virtually no empty space exists which is available for additional housing. Given California's continued population growth, it is just a matter of time before remaining vacant space will be exhausted in every major city in California. *Cotati Alliance For Better Housing v. City of Cotati,* 148 Cal. App. 3d 280, 292-93, 195 Cal. Rptr. 825, 833 (1983).

Further, the California Constitution severely limits increases in local taxes (California Constitution Article XIIIA), and requires voter approval for increases in spending (California Constitution Article XIIIB) and government operated housing projects (California Constitution Article XXXIV). Federal and state funding for municipal housing programs is by no means unlimited. The Legislature is well aware of these constraints. It knows that a city cannot solve its housing problems by simply constructing public housing and therefore expressly recognizes alternatives including "the administration of land use and development controls." California Government Code Section 65583(c). Indeed, there is no doubt that the protracted and severe housing problems in California defy easy solution.

Local governments must rely on the private sector to provide the vast bulk of affordable housing for their residents, including senior citizens, minorities, and persons of restricted income. Given the high cost of land, construction, and financing, which limit new construction and impair home ownership opportunities, and the low vacancy rate creating a "seller's market" in rental housing,[3] it is necessary for local governments to carefully consider the remaining options in order to meet state obligations. Police power regulation of land use has been one of those options at least since *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

The State Legislature has identified the problem; it has required local governments to address the problem by specific programs designed to meet a fair share of regional needs. Yet the Legislature has not directed any particular solutions. Rather, it has recognized that cities will use their historic and constitutional police powers to preserve and protect affordable housing opportunities. Reasonable rent control ordinances are among these recognized tools available to cities addressing their housing element obligations. Their continued use is foreseeable if not inevitable.

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[3] *See* K. Rosen, *California Housing Markets In The 1980s: Demand, Affordability and Policies* 48, 57 (1984) (California vacancy rate "is about 2%, less than one-third the national average").

> Unless and until the Legislature determines this issue to be a proper subject of general state law, local government will be under increasing pressure to adopt rent control as a means of protecting its citizens from excessive rent resulting from increased shortages of residential housing. *Cotati Alliance For Better Housing* v. *City of Cotati,* 148 Cal. App. 3d 280, 292-93, 195 Cal. Rptr. 825, 833 (1983).

In California, rent control is a valid exercise of the municipal police power and requires no additional state enabling authority. *Birkenfeld* v. *City of Berkeley,* 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976); *Santa Monica Pines* v. *Rent Control Board,* 35 Cal. 3d 858, 201 Cal. Rptr. 593, 679 P. 2d 27 (1984) (rent control, with "evident independent police power basis," not preempted by state law). When the Legislature amended the planning laws in 1980, it foresaw the use of existing local powers to enact rent control in order to meet the state housing goal:

> Nothing in this article [Housing Elements] shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls. . . . California Government Code Section 65589(b).

While Section 65589 is neutral on its face, in context it constitutes a legislative recognition that cities would continue to use rent control ordinances.[4] The legislature has withdrawn

[4]In light of *Birkenfeld,* a "grant of authority" would have been superfluous. There, the California Supreme Court held that local authority to enact rent control springs from the constitution and not from the legislature. *Id.* at 140, 130 Cal. Rptr. at 473. Moreover, California Government Code Section 65589 was passed at a time when Proposition 10 of 1980 was on the statewide ballot. Proposition 10 would have amended Article XI, Section 7 of the California Constitution to substantially restrict the authority of California cities to adopt rent control. Thus, Section 65589 expresses a legislative intent that amendment of the State Planning Law not be interpreted to enlarge the authority of cities if Proposition 10 passed, or repeal existing constitutional authority of cities if

local authority to implement rent control in very limited instances. With respect to state-subsidized housing projects, housing sponsors or developers "so regulated shall not otherwise be subject to controls on rent imposed by any state or local public agency or other local public entity." California Health & Safety Code Section 50202. In this context, the Legislature has recognized state subsidy as an alternative to local rent controls. And by tacitly approving them, the legislature has also recognized that rent controls are employed where state subsidies are not provided. Similarly, with respect to community care facilities, which are subject to detailed state regulation of rates and services, the Legislature has specified that local rent controls shall not apply. California Health & Safety Code Section 1518.

In the past decade, nearly 50 California cities have implemented rent control laws.[5] Opponents of rent control have unsuccessfully importuned the Legislature and the electorate on numerous occasions to withdraw local authority in this area. The voters of the state rejected Proposition 10 of 1980, which would have drastically restricted the types of rent control permissible. Various bills have been introduced in the Legislature to the same effect; none have passed.[6]

In the language of *Hallie,* these events and "statutory provisions plainly show that 'the legislature contemplated the kind of action complained of.' " *Id.* at 85 L. Ed. 2d 33.

Proposition 10 failed (which it did). Thus, Section 65589 does not reflect a legislative policy on the authority for rent control, but a deference to the electoral process and to home rule.

[5]Other urban areas have enacted rent controls in response to persistent and serious housing shortages. Over 100 cities in New Jersey, as well as cities in Massachusetts and New York, and the District of Columbia have rent control. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade,* 35 Rutgers L. Rev. 721, 725 ("approximately 10% of all privately owned residential rental units in the United States are subject to some form of rent control").

[6]Two bills limiting the scope of municipal rent control were introduced in the California legislature in its most recent session.

B. The Decision Should Be Affirmed Under The *Hallie* Test.

The California legislature's requirement that cities plan for and provide a fair share of affordable housing by means including police power legislation is a far cry from "mere neutrality" or general home rule authorization found insufficient to warrant exemption in *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982). By establishing the mandatory ends without limiting permissible means, and by mentioning rent control and encouraging cities to exercise their reserved police powers toward achieving the required goals, the State has "clearly articulated and affirmatively expressed State policy" embracing rent control. *Hallie* at 85 L. Ed. 2d 32. *See also* Areeda, *Antitrust Immunity for "State Action" After Lafayette,* 9 Harv. L. Rev. 435, 446 (1981) ("a policy to displace the antitrust laws will then be inferred if the challenged restraint on competition is a necessary or a reasonable consequence of engaging in the authorized activity").

Hallie determined that the "clear articulation" prong of the state action test does not require state compulsion and concluded that the "active state supervision" prong should not be imposed where the actor is a municipality. 85 L. Ed. 2d at 34. This clarification of the state action exemption reflects a carefully developed policy that apparently anticompetitive activity takes on a different complexion when adopted by local government. *See Community Communications Co. v. City of Boulder,* 455 U.S. 40, 56, n.20 (1982).[7]

A.B. 483 (Costa) would restrict municipal authority in certain areas of rent control. This bill passed the Assembly, but was not voted on in the Senate and was carried over to the next session. S.B. 505 (Ellis) would override *Nash v. City of Santa Monica,* 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984) app. dismissed ___ U.S. ___ 84 L. Ed. 2d 807 (1985), which upheld portions of Santa Monica's rent control law. This bill passed the Senate, and has been approved by the Assembly Judiciary and Ways and Means committees with amendments. The bill is pending in the Assembly.

[7]The notation in *Hallie* that "where state or municipal regulation of a private party is involved . . . active state supervision must be shown. . . .", *Hallie* at 85 L. Ed. 2d at 34, n.10, should not be interpreted to mean that a municipality is exempt if it is an actor but requires supervision if it is a regulator. Rather, the footnote seems to underscore the difference between the exemption of government agencies and private parties. The note refers to the Court's companion decision of *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. ___, 85 L. Ed. 2d 36 (1985), which concluded that the private rate-setting at issue was exempt because the states concededly "actively supervised the conduct of private parties." *Id.* at 51. *See id.* (Stevens, J. dissenting).

The California police power is characterized by its dynamic nature, its balancing of local control against statewide concerns, and its prerequisite of public participation in the legislative process. *See Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P. 2d 1001 (1976) (rent control reflects response to changing problems under elastic police power); *Santa Monica Pines v. Rent Control Board,* 35 Cal. 3d 858, 201 Cal. Rptr. 593, 679 P. 2d 27 (1984) (rent control coexists with state subdivision laws); California Government Code Section 54950 *et seq.* (open meeting law); Section 6250 *et seq.* (public records act); and Section 65583(c) (public participation by all economic segments of the community in housing element process). In home rule jurisdictions like California, legislative authorization is inherently broader than in states where cities cannot exercise police power without specific state approval. The California Constitution rejects detailed oversight of local affairs as a matter of both principle and practical necessities of government.

Thus, the test for "authorization" should be sufficiently flexible to permit home rule cities to protect their residents without going to the state legislature in every instance. The concept of foreseeability enunciated in *Hallie* meets these concerns. Where the State Constitution and State Legislature recognize the role of cities as initiators of legislative policy and the Legislature has directed municipal governments to design solutions to particular areas of statewide concern, sufficient authorization exists to immunize resulting local legislation from antitrust scrutiny.

II.

THE BERKELEY RENT CONTROL LAW IS NOT PREEMPTED BY THE SHERMAN ACT.

For appellants to prevail in this case, they not only must establish the inapplicability of the state action exemption, but also must prove that Berkeley's law is preempted by the Sherman Act under the Supremacy Clause. However, the "familiar and well-established" principles of preemption (*Hillsborough County v. Automated Medical Laboratories, Inc.*, ___ U.S. ___, 85 L. Ed. 2d 714, 721 (1985)) indicate to the contrary.

Appellants primarily base their preemption argument on the most general ground: local law is "indirectly" preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id., quoting Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Appellants' reason for relying on the *Hines* rule of preemption is clear. They are unable to make out a prima facie antitrust case. They are unable to show either express preemption or that Congress otherwise intended to foreclose state and local economic regulation. Indeed, they are even unable to establish implied preemption under *Hines*.

A. The Antitrust Laws Were Not Intended To Preclude Local Police Power Regulation.

Appellants rest their case on a commercial ideal of unfettered market pricing and an unregulated economy. Their nineteenth century notions of the marketplace read into the Sherman Act an intent to forbid any regulation, save those exempt under their narrow construction of the *Parker* doctrine. Yet, "neither the legislative history of the Sherman Act nor the opinions of the Court require the Sherman Act to be exclusive of all other regulation. . . . Rather, the antitrust laws are an interstitial system, an attempt to regulate competition as one aspect of economic life." Note, *Parker v. Brown, A Preemption Analysis,* 84 Yale L.J. 1164, 1170 (1975).

Appellants broadly overstate the purpose and policy of Congress in enacting the antitrust laws. They were not intended to deal with police power matters. *Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519, 530-31 (1983) ("Congress intended the Act to be construed in the light of its common law background"). "The Sherman Act was never intended to outlaw surrogate methods of social and economic controls in place of enforced competition." Handler, *The Current Attack on the Parker v. Brown State Action Doctrine,* 76 Col. L. Rev. 1, 15 (1976).

While the antitrust statutes do recognize the value of price competition in protecting the consuming public (*see, e.g., Associated General Contractors*), courts have repeatedly held that the public has other interests beside unregulated competition. *See Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 138 (1961) (First Amendment rights and political activity); *United Mine Workers v. Pennington* 381 U.S. 657 (1965) (labor activity and lobbying); *Goldfarb v. Virginia State Bar* 421 U.S. 773, 788-789, n.17 (1975) (professional standards and self-regulation); *Tripoli Company v. Wella Corporation,* 425 F.2d 932, 938 (3rd Cir. 1970) (protection of consumers and public safety); *State of Missouri v. National Organization for Women,* 620 F.2d 1301, 1309 (8th Cir. 1980) ("the indication is that it was the competitors in commerce that Senator Sherman had in mind as the concern of his bill, not noncompetitors motivated socially or politically in connection with legislation").

Like rights of expression or association and professional or public safety regulation, the alleviation of the effects of housing shortages furthers the public interest. Land use controls are well outside the field covered by federal antitrust laws. *See* Hovenkamp, *Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy,* 33 Hastings L.J. 325, 335 (1981).

The objective of rent control is not competition, but the redress of severe housing shortages which are inimical to public health and safety. If such municipal concerns were proscribed by the Sherman Act, Congress and the courts might have to assume plenary responsibility in areas not contemplated by the Act's authors.

Judicial interventionism in this area would invite the sort of standardless review that conflicts with policies of judicial economy and restraint. *See Community Communications Co. v. City of Boulder,* 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting); *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 640 (1976) (Stewart, J., dissenting); *First American Title Co. v. South Dakota Land Title Ass'n,* 714 F.2d 1439, 1453 (8th Cir. 1983), *cert. denied* 464 U.S. 1042 (1984) ("this type of judicial inquiry by the federal courts has long been repudiated in the context of due process"); Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies,* 32 Cath. U.L. Rev. 395, 398 (1983); Verkuil, *State Action, Due Process And Antitrust,* 75 Colum. L. Rev. 328, 333 (1975).

Moreover, with recent cases as a guide, preemption by the Sherman Act requires far more than some theoretical secondary impact on the ideal of competition—the most that is present here. Rather, direct conflict is required. It cannot be shown here.[8]

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[8]It is clear that Congress itself does not view local rent controls as incompatible with the Sherman Act. *See* District of Columbia Rent Control Act of 1973, 87 Stats. 623 (uncodified). There, Congress specifically empowered the District of Columbia Council to enact such rent controls as are "necessary and appropriate." It would appear rather anomalous for Congress to specifically authorize rent controls if such would "stand as an obstacle" to the antitrust laws. *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. ___, 85 L. Ed. 2d 36, 47 n.22 (1985) ("We think it unlikely that Congress intended to prevent the States from adopting [policies] virtually identical" to Congress'). Congress also enacted rent controls during both world wars (*see* 56 Stat. 23 (1942)), and rent controls were established by President Nixon on August 15, 1971. *See* Exec. Order No. 11615, 3 C.F.R. 602 (1971).

B. A Municipal Regulation Is Preempted By The Sherman Act Only If It Mandates Conduct By Private Parties Which In All Cases Violates Federal Antitrust Laws.

This Court has expressly rejected the proposition that any regulation with anticompetitive effects is automatically preempted by the Sherman Act. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978). There, gasoline producers claimed that a regulation prescribing market participation was "in conflict with the basic federal policy in favor of competition." *Id.* at 129. The Court responded:

> This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. *Id.* at 133.

See Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978) ("we start with the assumption that the historic police powers of the States [are] not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress").

Rather, in antitrust cases, preemption will be found only in the event of direct and "irreconcilable" conflict. *Rice v. Norman Williams Co.,* 458 U.S. 654, 659 (1982); *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978); *Joseph Seagram & Sons v. Hostetter,* 384 U.S. 35 (1966). A state or local statute irreconcilably conflicts with federal antitrust policy where it mandates private conduct that is violative of federal law. *Rice v. Norman Williams Co.,* 458 U.S. 654, 661-62 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980); *Southern Motor*

Carriers Rate Conference v. United States, 471 U.S. ___, 85 L. Ed. 2d 51, 57 (1985) (Stevens, J., dissenting).

Appellants contend that the elements of a prima facie case need not be proven here. Yet *Rice* establishes that, particularly in facial challenges, a violation of the federal antitrust laws must be *compelled* by local regulation. Appellants claim they are "compelled" to violate federal law when they charge a prescribed rent, but the cases on which they rely require far more than that for "conflict." Rather, the private party must be compelled to "follow a parallel price policy" (*Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 389 (1951)), or "form a combination and endeavor to [vertically control prices] by agreement" (*California Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97, 103 (1980)), or engage in some other activity that itself constitutes a violation of antitrust law. Thus, for local regulation to be preempted because it compels private parties to "violate" the Sherman Act, each element of a prima facie case must be proven, including agreement and restraint. Appellants' use of the per se rule avoids these critical elements.

III.

PRINCIPLES OF FEDERALISM REQUIRE REJECTION OF THE PER SE RULE IN ASSSESSING POLICE POWER REGULATIONS.

The per se rule is hostile to federalism. It ignores the distinctions between private and governmental impact on the economy. It constrains the role of the courts in balancing competing interests. It achieves expediency at a very high cost.

A. The Per Se Rule Was Adopted For Traditional Private Market Agreements And Fails To Achieve Any Salutary Purpose Respecting Governmental Health And Welfare Regulations.

The per se rule is intended to deter secret restraints on trade by private cartels. The rule not only furthers the will of Congress in condemning economic predations known at

common law, but promotes judicial economy by obviating the need for extensive trials of economic opinions and justifications where a practice has been proven to be among the evils that Congress intended to prohibit.

In cases of government regulation, neither policy justifying the per se rule is furthered. Application of the rule would deter government innovation in local matters. And the rule does not promote judicial economy, as local ordinances are already subject to far ranging judicial scrutiny including inquiry into their effect on interstate trade under the commerce clause.

Especially in the land use context, numerous tests exist to protect individuals from abuse of governmental power. These range from state open meeting and environmental review requirements to Fifth and Fourteenth Amendment protections. While courts pay substantial deference to local judgments as to the wisdom of economic legislation not affecting fundamental rights, they do not hesitate to strike laws that impermissibly burden individuals (*Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976) (first Berkeley rent control law violated due process)) or the nation's economy (*Santa Monica Airport Ass'n v. City of Santa Monica,* 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd,* 659 F.2d 100 (9th Cir. 1981) (ban on jet aircraft held violative of equal protection and commerce clauses)).

Against this background, the true nature of appellants' complaint should be examined. Their real grievance is the claimed insufficiency of their profits. They do not allege denial of access to markets,[9] predatory practices, prejudice to consumers of housing services[10] or any other ill effect on

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[9]The Berkeley law, like most other rent control laws, exempts new construction. Notwithstanding this exemption, appellants claim that Berkeley's Ordinance stifles construction. This assertion deserves no credence in a facial case.

[10]Appellants' feigned concern for the inability of renters to "compete for housing" in Berkeley is easily dismissed. First, appellants lack *jus tertii* standing. Second, it is not the price control

commerce. Instead, the gravamen of their case is that their property is being over-regulated--an issue cognizable by courts under familiar standards.

Although use of the per se rule might give appellants a "quick fix," in the long run, settled constitutional standards will continue to be the principal mechanism for review of land use and economic regulation. Appellants' unprecedented use of the per se rule out of its ordinary context promotes multiplicity of litigation but impedes judicial economy. It disrupts the orderly development of the antitrust laws and handcuffs cities in critical land use areas.

B. The Per Se Rule Is Inapplicable Because Berkeley's Rent Control Law Does Not Constitute "Price-Fixing."

Appellants assert that "governmentally imposed price-fixing" has been uniformly condemned by this Court under the per se rule because "it demands private conduct which the Sherman Act forbids" (Opening Brief at 19) (citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951)). They further rely on *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980); and *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), for the proposition that "price-regulation" by government is no different than "price-fixing" by market participants. Appellants misread these cases and, by doing so, ignore salutary differences. They cannot avoid proving the elements of a Section 1 case by the simple expedient of reciting the magic words "price-fixing."

The common denominator of *Midcal* and *Schwegmann* is that in each case the private parties set the prices; the state simply enforced private anticompetitive arrangements. In *Schwegmann*, the distributor enforced a private market restraint by using the state statute as a "club." 341 U.S. at

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aspect of Berkeley's law which "disfavors" incoming tenants. It is the eviction controls which confer tenant security against arbitrary displacement.

395. In *Midcal*, this Court reiterated the holding of the California Supreme Court, which had observed:

> the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests. . . . *Id.* at 100-101.

Actual or constructive private agreements to restrain trade, obviously running afoul of the Sherman Act, are not equivalent to government regulated prices. Indeed, they are the opposite. The market restraints in *Schwegmann* and *Midcal* had all the characteristics (and likely the same intent) as private agreements among producers and distributors.

> The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. *Midcal* at 445 U.S. 106.

But where prices are controlled by governmental action, the ingredient of market restraint is only half the story. The degree of government's involvement in the price setting is critical in selecting the appropriate analysis.

> The [California designation] statute contemplates a private market decision but provides a nonmarket mechanism for enforcing the decision. Hybrid restraints of this character require analysis that is different from a public regulatory scheme on the one hand, and a purely private restraint on the other. *Rice v. Norman Williams Co.*, 458 U.S. 654, 665 (1982) (Stevens, J., concurring) (citations omitted).

See Midcal at 445 U.S. 106, n.9 (contrasting governmental enforcement of private market schemes with state control of the market).

Thus, in *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), the state of Connecticut had regulated the price of alcoholic beverages and set minimum prices for

wholesalers and retailers. Plaintiffs contended that the scheme constituted resale price maintenance of the kind found unlawful in *Midcal.* However, the court noted a crucial distinction between the California and Connecticut schemes.

> In contrast [to California], the State of Connecticut establishes the markup and does not permit private parties to engage in resale price maintenance. . . . Unlike the California statute in *Midcal,* the Connecticut statutes do not authorize or compel private parties to enter contracts or combinations to fix prices in violation of Section 1 of the Sherman Act. 664 F.2d at 355.

Where government influence on other parties has been involved in antitrust cases, this Court has recognized that affected private parties may be found to violate the antitrust laws only where they act voluntarily.[11] *See, e.g., Cantor v. Detroit Edison Co.,* 428 U.S. 579, 592, 594-95 (1976); *Continental Oregon Co. v. Union Carbide Corp.,* 370 U.S. 690, 706-07 (1962); *Olsen v. Smith,* 195 U.S. 332 (1904). Appellants' argument would create a conspiracy for antitrust purposes wherever a private party obeyed the law. This is simply untenable in light of common sense and case law.

Consistent with Justice Cardozo's admonition that "a fertile source of perversion in constitutional theory is the tyranny of labels," (*Snyder v. Massachusetts,* 291 US 97, 114 (1934)), this Court has recognized the pitfalls of the tag "price-fixing."

> As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." . . . Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing." That will often, but not always, be a simple matter. *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 U.S. 1, 9 (1979).

[11]Even where agreement is obtained by coercion, there must be an analytical difference between private and governmental conduct. Coercion by private individuals is illegal, whereas coercion (through the enforcement of law) is not only customary for governments, it is their means of operation. *See* Comment, *A Proposed Model of the Sovereign/Proprietary Distinction,* 133 U. Pa. L. Rev. 661, 679-80 (1985). If every coercive governmental action, such as a zoning law geographically allocating the market, were sufficient to satisfy the conspiracy requirement of Section 1, there would not be much substance left to that requirement.

Appellants mistakenly treat local governments as economic actors subject to the same scrutiny as profit-making private business activity. They compound this mistake by measuring government action against the standard of actors operating in a theoretical, wholly unregulated market. These false assumptions lead to the impossible conclusion that government cannot act if its action would affect the economy.

C. The Per Se Rule Does Not Apply In Cases Of First Impression.

It is firmly established that the per se rule may not be used in a novel antitrust case. *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 U.S. 1, 19 (1979) (restraint will be deemed illegal per se only after courts have considerable experience with that type of behavior); *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963) ("we need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' ").

As Justice Brennan noted in his concurrence in *White Motor,* to employ the per se rule in a novel case, the court "must determine whether experience warrants, at this stage, a conclusion that inquiry into effect upon competition and economic justification would be . . . irrelevant." *Id.* at 265-66. *See also Jetro Cash & Carry Ent. v. Food Distribution*

Center, 569 F. Supp. 1404, 1413 (E.D. Pa. 1983) (The *per se* rule is drastic and is only used "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.")

It is far from accepted that rent control in and of itself negatively affects competition in the rental market.[12] The impact of rent control's restraint on competition should be evaluated by its "demonstrable economic effect." *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 59 (1977). *See also Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 362 (1982) (Powell, J., dissenting). This evaluation, however, has yet to be done. The evidence concerning the impact of rent control on the rental market, i.e., the quantity and quality of rental housing, has been, and remains, uncertain.

> Rent stabilization did not occur in a vacuum, nor are its impacts worked out in a constant environment. Housing markets in most market economies are volatile and subject to many influences. The demand for housing and its supply, both for rental and ownership, are deeply affected by larger forces in the economy and society. Some of these factors are relatively easy to identify and trace. Others are obscure and not obvious at first sight. City of Los Angeles Rent Stabilization Division, *Rental Housing Study: Housing Production and Performance Under Rent Stabilization* (1984) at 11.

[12]There is considerable controversy over the economic effects of rent control. *See e.g.,* Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences* 69 Cornell L. Rev. 517, 581 (1984) (rent control does not discourage housing construction); Baar & Keating, *The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control,* 7 Urb. Law. 447, 491 fn. 209 (1975) (myth that rent control automatically results in drastic reduction of housing construction or undermaintenance of housing stock has been disproven); Keating, *Rent Control in California: Responding to the Housing Crisis,* 17 (1983) (no evidence of negative effects of California rent control).

What is known, however, is that rental housing in California is in such a crisis state that it does not respond to normal market forces. K. Rosen, *California Housing Markets in the 1980's: Demand, Affordability, and Policies* 48, 57 (1984). In a responsive, efficient market an increase in rental housing demand should cause an increase in supply; the current housing shortage indicates that the supply of housing has not responded to renter demand. *See* Keating, *Rent Control in California: Responding to the Housing Crisis* 2-3 (1983). The inelasticity of supply allows landlords to increase housing rents to reduce demand. *See* Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach,* 53 Fordham Law Review 23, 54-55 (1984). It is the essence of government's "role in our free market system to correct market failures." Comment, *A Proposed Model of the Sovereign/Proprietary Distinction,* 133 U. Pa. L. Rev. 661, 678 (1985).

The conclusions of the studies of the effects of rent control on rental quality and quantity vary at the extremes. No one knows the "demonstrable economic effect" of rent control. Whether or not it restrains competition remains an open question on which economists, lawyers, and government officials frequently disagree. Application of the per se rule on the barren record before this Court is tantamount to asking for judicial notice of rent control's supposed anticompetitive effects, inviting the Court "to ramble through the wilds of economic theory. . . ." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 609 n.10 (1972).

IV.

PRINCIPLES OF FEDERALISM REQUIRE MODIFICATION OF THE RULE OF REASON TO ACCOMMODATE LOCAL POLICE POWER REGULATIONS.

The appropriate standard under the antitrust laws should be consistent with those applied in other challenges to land use and other economic regulation. The primary constitu-

tional guarantees—due process and equal protection—are satisfied when public bodies have a reasonable basis for regulation. "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa,* 372 U.S. 726, 729 (1963).

In preemption and Commerce Clause cases, courts attempt to reconcile legislative schemes and balance local and federal interests. *Huron Cement Co. v. Detroit,* 362 U.S. 440 (1960). Ouster of local laws under the supremacy clause is disfavored; regulations must be proven to be in direct conflict with federal law or plainly repugnant to policy. Similarly, local regulations will not be invalidated under the commerce clause unless they directly and substantially burden commerce and the putative local benefits are substantially outweighed by the negative impacts on commerce.

These carefully considered and hard-won limitations on economic regulations would be irrelevant if, contrary to settled practice, the per se rule or mechanical application of the rule of reason authorized courts to reconsider the wisdom of legislation.

A. Commerce Clause Cases Provide An Appropriate Framework Of Analysis When Balancing The Benefits Of Local Regulations Against Their Impact On Commerce.

The per se rule and rule of reason are defective when applied to municipal regulation in that they cannot accommodate valid governmental interests underlying health and welfare regulations. As the California Supreme Court recognized, it is unnecessary to search for new tools that accommodate both the national interest in a free economy and the local interest in addressing specific social problems. There is an existing approach for balancing the effects of local regulation on commerce against their putative social benefits. Local regulation with adverse extraterritorial effects may be found invalid under the commerce clause as imposing an unreasonable burden on interstate commerce. *Huron Cement Co. v. Detroit,* 362 U.S. 440 (1960).

The policies underlying antitrust and commerce clause scrutiny are parallel. In both cases, the concern is with direct interference with the free flow of the nation's economy. Ever since *Cooley v. Board of Wardens,* 12 How. 299 (1852), this Court has construed the "great silences of the Constitution" as limiting state and local authority to regulate and interfere with interstate commerce. But the commerce clause does not constrain private actors who obstruct commerce; the Sherman Act accomplishes that goal. In some respects, application of the Sherman Act to local health and safety regulation duplicates judicial scrutiny already available; it has essentially the same ends. Accordingly, incorporating the familiar commerce clause standard into antitrust challenges to local laws serves the dual goals of federalism and judicial economy.

Cases under the Sherman Act often speak of restraints "unreasonably burdening interstate commerce," the classic commerce clause test. *See, e.g., Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219, 234 (1948); *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 746 (1976). Other cases have merged the tests under the commerce clause and Sherman Act for determining the requisite impact on interstate commerce. For instance, in *American Motors Sales Corp. v. Virginia Automobile Dealers,* 592 F.2d 219 (4th Cir. 1979), the court analyzed *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96 (1978), an antitrust case, in determining that a state statute did not unconstitutionally burden commerce. At issue in the two cases were similar regulatory schemes involving automobile distributorships.

> Although *[Fox]* was testing the California law under the due process clause and the Sherman Act, the Court's recognition of the legitimacy of state regulation designed to protect those interests is pertinent to our [commerce clause] inquiry here. 592 F.2d at 223.

See also Philadelphia v. New Jersey, 437 U.S. 617, 621-22 (1978) (rejecting a broader notion of "commerce" when Congress has acted than when the commerce clause operates directly on the states); *Cardio-Medical Ass'n v. Crozer-Chester Medical Center,* 721 F.2d 68, 76 (3d Cir. 1983) (court equated burdens on interstate commerce under the commerce clause with conduct that violates federal antitrust policy).

By this approach, decades of commerce clause jurisprudence can be used to guide municipal antitrust developments. Whether the inquiry into economic effects is cast in terms of the commerce clause or the Sherman Act, the quality of the local interest and the "reasonableness" of the burden should be a legitimate concern in evaluating challenges to local regulation.

B. Rent Control Does Not Unreasonably Burden Commerce.

Under our constitutional scheme, the States retain authority under the police power to regulate matters of "legitimate local concern" when interstate commerce is affected. *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 36 (1980). The commerce clause permits local regulation unless its effects are so burdensome as to fall within the negative implications of the clause. The general rule is described in *Pike v. Bruce Church,* 397 U.S. 137 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.[13] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will

[13]Assuming arguendo rent control's effect on commerce is sufficient for jurisdictional purposes (*Cf. Russell v. United States,* 53 U.S.L.W. 4652 (June 3, 1985)), this in no way suggests that it so burdens commerce as to be invalid.

> be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 142 (citations omitted).

Moreover, the subjective balancing test of *Bruce Church* has evolved to a more specific test where matters of local concern are involved. The regulation of public health, safety, and welfare under the police power is such a local concern. *See Raymond Motors Transp. Co. v. Rice,* 434 U.S. 429, 443 (1978); *Construction Ind. Ass'n of Sonoma County v. City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976).

California courts have repeatedly held that rent control is rationally related to the general welfare of the community. *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 160, 550 P.2d 1001, 130 Cal. Rptr. 465, 488 (1976). Local rent controls are non-discriminatory and do not "disrupt" any required uniformity in, or otherwise burden, interstate commerce. To the extent the converse is necessary to appellants' case, they must be put to their proof.

CONCLUSION

A reversal in this case would have a severe impact beyond its rent control context. It would require cities to seek specific enabling authority from the state legislature for a wide variety of regulations that could be labeled as "restraints on trade." Laws regulating the time, place, and manner of conducting business, long a key facet of municipal regulation, would be vulnerable to antitrust invalidation unless the state legislature specifically authorized their adoption. Land use regulation, essentially intended to protect the character of communities, might similarly require state approval.

For nearly a century, the antitrust statutes have protected consumers from the results of unregulated markets. It would be ironic indeed if the Sherman Act was stood on its head to prevent government regulation of the marketplace for the

public benefit. This Court should dismiss the mechanical, unprecedented, and opportunistic application of the antitrust statutes attempted here.

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on September 12, 1985, I served the within *Amicus Curiae Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 12, 1985, at Los Angeles, California.

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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, *et al.*,
Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

1. Whether a city's residential rent control ordinance may be deemed a "contract, combination . . . or conspiracy" violative of the Sherman Antitrust Act?

2. Whether ordinary standards of antitrust analysis, including *per se* rules developed in the context of predatory business practices, should be applied to evaluate municipal regulatory action undertaken in the public interest?

3. Whether municipal regulation can qualify for the state action exemption from the Sherman Act only on the basis of an explicit authorization in a single statute, or whether the necessary state authorization can be provided by a combination of state constitutional provisions and legislative actions?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
INTRODUCTORY STATEMENT	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE ORDINANCE IS VALID UNDER THE SUPREMACY CLAUSE BECAUSE IT DOES NOT CONFLICT WITH THE SHERMAN ACT	5
A. Berkeley's Rent Control Ordinance Is Not Inconsistent With the Sherman Act Because It Does Not Mandate Nor Permit Concerted Activity	5
B. Public Interest Regulation by Local Governments Should Not Be Subjected to the Same Analysis for Antitrust Purposes as Anticompetitive Commercial Activity	9
C. The Local Government Antitrust Act of 1984 Does Not Sanction The Preemption of Regulatory or Legislative Actions By Local Governments	13
II. EVEN IF THE ORDINANCE WERE FOUND INCONSISTENT WITH THE SHERMAN ACT, IT IS NONETHELESS VALID UNDER THE STATE ACTION DOCTRINE	17
CONCLUSION	22

TABLE OF AUTHORITIES

CASES

	Page
Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555 (5th Cir.) (en banc), *petition for cert. filed*, 53 U.S.L.W. 3509 (U.S. Dec. 14, 1984) (No. 84-951)	10
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)	12
Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 550 P.2d 1001 (1976)	19
Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979)	12
California Retail Liquor Dealers' Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	6, 7, 14, 15, 21
City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978)	12, 14, 18, 21
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	5, 12, 13, 14, 18
Copperweld Corp. v. Independence Tube Corp., —— U.S. ——, 104 S.Ct. 2731 (1984)	9
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	8, 9
Ferguson v. Skrupa, 372 U.S. 726 (1963)	12
Fisher v. City of Berkeley, 37 Cal.3d 644, 693 P.2d 261 (1984) *prob. juris. noted*, —— U.S. ——, 105 S.Ct. 2653 (1985)	18, 19
Monsanto Co. v. Spray-Rite Service Corp., —— U.S. ——, 104 S.Ct. 1464 (1984)	5
New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978)	7
Parker v. Brown, 317 U.S. 341 (1943)	17, 18
Reiter v. Sonotone Corp., 442 U.S. 330 (1979)	9
Rice v. Norman Williams Co., 458 U.S. 654 (1982)	6, 9
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)	7, 8
Sproles v. Binford, 286 U.S. 374 (1932)	12
Southern Motor Carriers Rate Conference v. United States, —— U.S. ——, 105 S.Ct. 1721 (1985)	17, 18, 21
Town of Hallie v. City of Chippewa Falls, 105 Wis.2d 533, 314 N.W.2d 321 (1982)	20

TABLE OF AUTHORITIES—Continued

	Page
Town of Hallie v. City of Eau Claire, —— U.S. ——, 105 S.Ct. 1713 (1985)	*passim*
United Mine Workers of America v. Pennington, 381 U.S. 657 (1965)	8
United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956)	5
United States v. Grinnell Corp., 384 U.S. 563 (1966)	5
Unity Ventures v. County of Lake, No. 81 C-2745 (N.D. Ill. 1984)	15

CONSTITUTIONAL PROVISIONS

U.S. Const. art. VI, § 2	5, 6

STATUTES

Section 1 of the Sherman Act, 15 U.S.C. § 1	*passim*
Section 2 of the Sherman Act, 15 U.S.C. § 2	5
Civil Rights Act of 1871, 42 U.S.C. § 1983	4, 11
Clayton Act, § 16, 15 U.S.C. § 26	16
Consumer Goods Pricing Act of 1975, 89 Stat. 801 (1975)	7
Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36	4, 13, 15, 16, 17
Miller-Tydings Act, 50 Stat. 693 (1937)	7
Cal. stats. 1972 (Reg. Sess.) res. ch. 96, p. 3372	19
Cal. Govt. Code § 65203(c)	20
Cal. Govt. Code § 65580(d)	20

LEGISLATIVE MATERIALS

H.R. Rep. No. 965, 98th Cong., 2d Sess. (1984)	13, 14, 15, 16, 17
S. Rep. No. 593, 98th Cong., 2d Sess. (1984)	16
130 Cong. Rec. H8474, H8475 (daily ed. Aug. 6, 1984)	14

BOOKS & PERIODICALS

R. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978)	9
Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059 (1980)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1538

ALEXANDRA FISHER, *et al.*,
Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States, and an organization of city and regional planners and officials concerned with planning and orderly urban development. *Amici* have a vital in-

terest in legal issues that affect the powers and responsibilities of state and local governments.

As this case is presented to the Court, the issue concerns whether a city may regulate rents without violating the Sherman Act. Far broader issues, however, are implicated in the decision. Not only will this Court's decision affect the role of local governments in regulating housing, but the decision inevitably will affect the ability of local governments to regulate other businesses in the public interest. In particular, a decision by this Court adverse to appellees would raise serious questions about all rate regulation by home rule local governments.

Many local governments regulate the maximum rates that may be charged for public services such as taxicabs, trash collection, parking, airport operations, and ambulances. The current spate of antitrust litigation, moreover, extends to areas far beyond the rate litigation involved in the present case. Franchising, business and occupational licensing, municipal contracting and planning and zoning regulations all have offered targets for antitrust litigation. The cost is literally incalculable as cities are forced to spend scarce dollars responding to this wave of lawsuits.

Amici believe that traditional antitrust analysis is misapplied in the context of local public rate regulation. Rate regulation that is neutral among competitors and that is enacted in the public interest by a city with no competitive stake in the regulated market should not be lightly abrogated.

Significantly, there is no allegation or proof in this case of any conspiracy between the City of Berkeley and any private competitors. For nine decades, no court imagined any conflict could exist between such local public rate regulation and § 1 of the Sherman Act in the absence of a conspiracy. *Amici* submit that, against this background and in light of the sketchy record on this appeal, the judgment below upholding the ordinance should be affirmed.

INTRODUCTORY STATEMENT

This appeal presents the question whether a residential rent control ordinance adopted by the City of Berkeley is preempted by the Sherman Antitrust Act. While *amici* believe that the challenged ordinance falls within the state action exemption, they urge the Court to determine that the Sherman Act should not be applied at all to this kind of regulatory activity.

Amici recognize that local governments are not immune from the operation of the antitrust laws. Antitrust restraints may apply to a local government in cases in which it participates in a regulated market or conspires with one or more market competitors. However, ordinary antitrust analysis is anomalous when applied to a general regulation, enacted by a city in the public interest. The regulation of rates is a commonplace activity of local governments. Municipalities routinely establish maximum rates for a wide range of public services, including trash collection, ambulance service and taxicab service.

The California Supreme Court recognized that, to the extent that municipal regulations are subject to antitrust scrutiny, the ordinary *per se* rules developed in the context of predatory commercial practices make no sense. Applying such rules to regulatory actions of cities would handicap local government efforts to deal with important urban problems.

Berkeley's rent control ordinance was not enacted to stifle competition in the rental housing market, but to correct an imbalance in that market. The city acted to assure that rental housing would continue to be available to its residents at reasonable rates. While economists may differ concerning the wisdom and efficacy of rent control, its choice as a remedy for Berkeley's housing problem represented a legislative decision by the voters of the municipality which should not be subject to second-guessing by the courts.

SUMMARY OF ARGUMENT

1. Berkeley's residential rent control ordinance is not preempted by the Sherman Act. The Sherman Act prohibits only those restraints of trade that are implemented by a "contract, combination . . . or conspiracy," and the ordinance neither mandates nor permits concerted private activity which could fit that definition. Consequently, the Act can be applied to the ordinance only through an inappropriate legal fiction that would treat government compulsion as the equivalent of a conspiracy.

2. State and local government regulation in the public interest serves goals similar to those of the Sherman Act, and should not be evaluated on the same basis as the commercially motivated actions of private businesses. State and local governments are responsible to their electorates and operate under public scrutiny. They are, moreover, subject to the constraints imposed by the Civil Rights Act upon overreaching and exploitation "under color of state law." Their legislative and regulatory actions should not be assessed under *per se* rules developed to control predatory commercial activity.

3. The Local Government Antitrust Act of 1984 did not establish nor endorse any substantive standard of antitrust liability for local governments, but left the development of those standards to the courts. The Act sought only to discourage private litigation against municipalities by insulating them from liability for damages and imposing conditions on private antitrust plaintiffs.

4. Even if Berkeley's rent control ordinance were deemed to be inconsistent with the Sherman Act, it would be protected from preemption by the state action exemption. The ordinance implements responsibilities placed upon the city by state law; it is closely similar in substance to an earlier charter provision which was expressly ratified by the state legislature; and California's

courts have concluded that the ordinance has state authorization. Because the only action challenged as anticompetitive in this case is that of the city, active state supervision is not required for the application of the state action exemption.

ARGUMENT

I. THE ORDINANCE IS VALID UNDER THE SUPREMACY CLAUSE BECAUSE IT DOES NOT CONFLICT WITH THE SHERMAN ACT.

The threshold issue in this appeal, which comes to this Court without any factual record, is whether the ordinance on its face is in conflict with the Sherman Act. If the ordinance does not conflict with the Sherman Act, then the judgment below should be affirmed.

A. Berkeley's Rent Control Ordinance Is Not Inconsistent With the Sherman Act Because It Does Not Mandate Nor Permit Concerted Activity.

Section one of the Sherman Act, 15 U.S.C. § 1, prohibits only those restraints of trade that are implemented by a "contract, combination . . . or conspiracy." The Act reflects a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, ——, 104 S.Ct. 1464, 1469 (1984). This Court has never found a conflict between § 1 of the Sherman Act and a state law or local ordinance that displaced competition with public regulation but did not mandate or permit private concerted action.[1] *See Com-*

[1] Appellants have not claimed in this Court that the ordinance conflicts with § 2 of the Sherman Act, although they did raise this claim in the court below. Any such claim must fail. To establish a violation of § 2, a relevant market must first be established. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). Here appellants have neither alleged nor proven any relevant market. Indeed, the city is not even a participant in the regulated housing market.

munity Communications Co. v. City of Boulder, 455 U.S. 40, 47 n.9 (1982) (citing district court's finding with respect to conspiracy issue).

Thus, in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), this Court unanimously held that a California statute governing the distribution of alcoholic beverages was not preempted by the Sherman Act under the Supremacy Clause. The statute at issue in *Norman Williams* prohibited any "unauthorized wholesaler from obtaining the distiller's products from outside the distiller's established distribution chain." 458 U.S. at 661. Significantly, the "designation" of authorized wholesalers required by the California statute depended upon an *actual agreement* between a distiller and his designated wholesalers in California.

Notwithstanding this element of private concerted action in *Norman Williams*, this Court held that the statute did not necessarily conflict with the Sherman Act, and was therefore valid under the Supremacy Clause. The Court reasoned as follows:

> [A] state statute, when considered in the abstract, may be condemned under the antitrust laws *only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases*, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. 485 U.S. at 661 (emphasis added).

Amici submit that *Norman Williams* is controlling in this case. The Berkeley ordinance does not require conduct that constitutes a violation of the antitrust laws, nor does it place "irresistible pressure" on private parties to violate the antitrust laws. Therefore, the ordinance is not preempted by the Sherman Act.

This Court's decision in *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), is not to the contrary. That case involved a California statute that permitted wine producers to fix the resale price of their wine. The statute, in effect, circumvented the Consumer Goods Pricing Act of 1975, 89 Stat. 801 (1975), which revoked the authority Congress had previously granted the states to authorize resale price maintenance. *See Midcal*, 445 U.S. at 102-03.

This Court found that the California statute was preempted by the Sherman Act:

> California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. [citations omitted] *The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers.* 445 U.S. at 103 (emphasis added).

The statute at issue in *Midcal* authorized a private party—the wine producer—to compel a second private party—the wholesaler—to enter into an agreement fixing resale prices. It is precisely this element of private concerted action, which was present in *Midcal*, that is wholly lacking in this appeal.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), on which appellants rely, is also inapposite. In that case, this Court held that a state statute enacted pursuant to the Miller-Tydings Act, 50 Stat. 693 (1937) (repealed by the Consumer Goods Pricing Act, 89 Stat. 801 (1975)), could not authorize an injunction prohibiting price-cutting by a retailer who had refused to enter into a resale price maintenance agreement with his distributor. Justice Douglas, in his opinion for the majority, noted that the Miller-Tydings Act expressly prohibited *horizontal* price-fixing agreements, and that the "spirit" of this express provision was violated by any prohibition on price-cutting by retailers who had *not* signed resale price maintenance agreements. 341 U.S. at 389. "In *Schwegmann*, the State attempted to authorize and immunize *private* conduct violative of antitrust laws." *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96,

110 (1978) (emphasis added). As the ordinance here neither authorizes nor seeks to immunize any private conduct violative of the Sherman Act, *Schwegmann* is not on point.

In this appeal, there is no allegation or proof of any private concerted action. Instead, this case involves government regulation of the rents charged by individual landlords. The City of Berkeley, through the ordinance, limits the rent charged by each landlord to the rent that landlord charged on May 31, 1980, plus any increase permitted pursuant to the ordinance. Far from reflecting concerted action by the landlords, the ordinance is actively opposed by them. The ordinance neither mandates nor authorizes concerted action by anyone.

Thus, the ordinance could conflict with § 1 of the Sherman Act only by the creation of a legal fiction that government compulsion of individuals is to be deemed to be a "contract, combination . . . or conspiracy" for purposes of that act. There is some confusion among appellants and the *amici* supporting them on the exact legal fiction that they wish to urge. Appellants assert that the requisite concerted action should be assumed to be among the landlords. Appellants' Brief at 22-23. *Amicus* California Housing Council, Inc., on the other hand, submits that the *tenants* in Berkeley should be the fictional conspirators. *Amicus* Brief at 4. This Court should reject both theories as fanciful.[2]

[2] As noted above, the existence of a conspiracy among the landlords of Berkeley is flatly contradicted by their strenuous opposition to the ordinance. To the extent that it can be argued that there was an agreement among the tenants to obtain enactment of the ordinance through the initiative process, it should be protected from antitrust challenge under the *Noerr-Pennington* doctrine. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-140 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-670 (1965). Under the *Noerr-Pennington* doctrine, "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr* at 136. The participation by a tenant as a voter in an initiative process should be treated as though it were "an attempt to persuade the legislature" for purposes of analysis under the *Noerr-Pennington* doctrine.

There is no good reason to create any legal fiction in this appeal. Indeed, this Court has recently rejected the use of a legal fiction to find the concerted action necessary for a violation of § 1 of the Sherman Act. In *Copperweld Corp. v. Independence Tube Corp.*, —— U.S. ——, 104 S.Ct. 2731, 2745 (1984), this Court held that a corporation and its wholly-owned subsiidary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act." As this Court stated, the distinction between concerted and unilateral action in § 1 of the Sherman Act will "necessarily disappoint those who find that distinction arbitrary." 104 S.Ct. at 2744. Appellants here are among those disappointed, because the ordinance neither mandates nor permits any concerted action among landlords or anyone else. Therefore, the ordinance does not conflict with § 1 of the Sherman Act, and should be upheld under *Norman Williams*.

B. Public Interest Regulation by Local Governments Should Not Be Subjected to the Same Analysis for Antitrust Purposes as Anticompetitive Commercial Activity

In many ways, the Sherman Act and the regulatory acts of state and local governments serve common purposes. The Sherman Act was designed by Congress to be a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), *quoting from* R. Bork, *The Antitrust Paradox* 66 (1978). Governments, too, perform important consumer protection functions. *See* Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059, 1095-1099 (1980). Governments have responsibility in countless areas for providing services to the public which otherwise would not be provided on an

equitable basis, or would not be provided at all, because of inefficiencies or diseconomies in the private sector.

Fundamental differences distinguish the actions of local governments taken in furtherance of public policy objectives from the commercially motivated actions of private parties. As this Court noted in *Town of Hallie v. City of Eau Claire*, —— U.S. ——, 105 S.Ct. 1713 (1985):

> Where a private party is engaging in the anti-competitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. 105 S.Ct. at 1720-21 (emphasis in original).[3]

State and local governments, moreover, are unlike private parties in that they "are checked to some degree through the electoral process." *Town of Hallie*, 105 S.Ct. at 1720 n.9. States and their local governments have the power and the responsibility under the intergovernmental system to implement public policy in various fields. A formidable body of constitutional, statutory and case law attempts to sort out the varying responsibilities of the federal, state and local governments in providing essential services and in regulating private parties to advance the public interest.

[3] In *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1571-72 (5th Cir.) (en banc), *petition for cert. filed*, 53 U.S.L.W. 3509 (U.S. Dec. 14, 1984) (No. 84-951), Judge Higginbotham, in a concurring opinion, stated that:

> [W]here . . . the city acts as a regulator or governor of the sales and deliveries of goods and services to its constituents, it is engaged in a role dissimilar from that of private business.
>
> In our economic system, private business enterprises are presumed to respond predominately, if not exclusively, to the profit motive. By contrast the concept of "profit" *per se* is alien to the purposes of a unit of government. Consequently, the clash of interests necessitating an antitrust law—the private desire to reap extra-normal profits versus the public interest in free competition—will not appear in its traditional form when the accused antitrust conspirator is a governmental entity.

As noted in *Town of Hallie*, 105 S.Ct. at 1720 n.9, the activities of governmental entities are subject to public scrutiny under state open meeting laws, "sunshine" statutes, and other mandatory disclosure requirements such as freedom of information or financial disclosure acts.

In addition, unlike private parties, local governments, when acting "under color of state law," are subject to full review of their activities under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Just as the antitrust laws prevent overreaching and exploitation by private sector actors, § 1983 imposes duties on public officials and governmental entities. Neither government, exercising its police power, nor private business, wielding economic power, is allowed to violate fundamental principles of fairness and equity under the American system of law. Civil rights statutes play a similar role in accomplishing this objective for government as do the antitrust laws in the private sector.

Appellants argue that the ordinance is preempted under the Supremacy Clause because it is "contrary to federal procompetition policies." Appellants' Brief at 22. They imply that, although there is no *direct* conflict between the ordinance and the Sherman Act and no evidence of concerted action, the ordinance nonetheless should be preempted because its supposed effects are contrary to the underlying policy of the Sherman Act. However, there has been no evidentiary hearing in this case, and consequently the record in this Court contains no facts on the economic effects, good or ill, of the ordinance. Indeed, appellants' complaint neither mentions the Sherman Act nor contains any allegation as to the effects of the ordinance on competition.

This Court has ruled that where a law is attacked on its face on constitutional grounds, deference must be

given to the legislative determination that the law is needed. "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).[4]

The same deference should be paid to state and local laws when a facial challenge is based on a federal statute. For example, when confronted with a set of economic circumstances not previously examined, this Court has in the past insisted on a full factual record before finding a conflict with the policies of the Sherman Act. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 10 (1979) (an eight week trial had been held in district court; this Court noted "[we] have never examined a practice like this one before").

The well-settled law concerning the application of the *per se* rules to price-fixing among private parties articulated in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), should not be applied to legislative actions of local governments taken to protect the common welfare. Legislative actions implementing public policy should not be assessed under the *per se* rules as the public policy advanced by the action of the local government cannot properly be judged under those rules.

This Court has recognized some of the doctrinal difficulties in applying existing antitrust rules to the activities of local governments. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 at 417 n.48 (1978); *Boulder*, 455 U.S. at 56 n.20. The California Supreme Court properly declined to apply mechanically to Berkeley's ordinance the formulae developed for antitrust enforcement in the private sector. In the absence of a

[4] "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." *Sproles v. Binford*, 286 U.S. 374, 388-389 (1932), cited in *Ferguson*, 372 U.S. at 730 n.7.

factual record, this Court should not find Sherman Act preemption, but should affirm the decision below.

C. The Local Government Antitrust Act of 1984 Does Not Sanction The Preemption of Regulatory or Legislative Actions By Local Governments.

Appellants suggest that Congress, in enacting the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34 to 36, sanctioned the application of traditional antitrust standards, including the *per se* rules, to regulatory or legislative actions of local governments. *See* Appellants' Brief at 15-16.[5]

The Local Government Antitrust Act of 1984, which precludes the recovery of monetary damages from local governments under the Sherman Act, was enacted on the next to the last day of the 98th Congress. It was designed as an interim measure, to stem the flood of antitrust lawsuits challenging the regulatory and legislative actions of local governments in the wake of this Court's decision in *Boulder*. While Congress chose the "remedies" approach, primarily to prevent financial disaster for local governments, the Act's legislative history conclusively refutes any intention on the part of Congress to endorse the application of the antitrust laws to regulatory or legislative actions by local governments.

The House Judiciary Committee recognized that § 1 of the Sherman Act was not originally intended to apply to states and localities, noting: "A review of the legislative history of the Sherman Act reveals no evidence of an express Congressional intent to apply the antitrust laws to either state or local governments." H.R. Rep. No. 965, 98th Cong., 2d Sess. 4 (1984) (hereinafter "H.R. Rep.

[5] Several of the *amici* supporting appellants make similar arguments. *See, e.g.*, Brief of National Apartment Association *et al.* at 13-15; Brief of California Housing Council, Inc. at 15-16; Brief of Coalition for Competition in Apartment Rentals at 19-23.

No. 98-965"). Statements during floor debate by the legislation's sponsors echoed this view. Thus, Representative Peter Rodino, Jr. of New Jersey, Chairman of the House Judiciary Committee and the floor manager of the bill, although he had reservations about exempting *non-governmental* actions of local governments from antitrust scrutiny, stated: "At least where classic governmental activity to enhance or protect the public health, safety, or welfare is concerned, most everyone agrees that the antitrust laws have no place in, and can only interfere with, legitimate governing." 130 Cong. Rec. H8474 (daily ed. Aug. 6, 1984). And Representative Hamilton Fish, Jr. of New York, the ranking minority member of the Committee, stated: "The Federal antitrust laws were never intended to apply to legitimate governmental decisionmaking." *Id.* at H8475.

The Committee chose to focus on eliminating the immediate financial danger facing local governments. A major obstacle to Congressional enactment of substantive antitrust standards for local governments was the courts' failure to establish a consistent doctrinal basis for the state action exemption.[6] The Committee faulted this Court for failing to provide "even indirect guidance" on the question of how "the national policy favoring competition" should be reconciled with "*the presumptively valid functions of local government.*" H.R. Rep. No. 98-915 at 7 (emphasis added). It concluded that, "[a]t a

[6] "The Supreme Court has been criticized—and perhaps rightfully so—for not applying a consistent theory in the recent 'state action' cases. The five decisions before *Midcal* contain thirteen separate opinions. The two critical opinions involving municipalities (*Lafayette* and *Boulder*) contains (sic) eight separate opinions by various Justices. The Court is open to criticism . . . for its failure to provide an analytical framework by which state action cases can be predicted with reasonable certainty. The only certainty in the law (as a result of the *Boulder* decision) may be that a home-rule amendment to a state constitution is not sufficient in itself to immunize a municipality's action in a wide variety of contexts." H.R. Rep. No. 98-965 at 7 (footnotes omitted).

minimum," the record before the Judiciary Committee provided sufficient justification for the enactment of legislation to "remove the punitive aspect from antitrust suits." *Id.* at 12.

Citing the problems in attempting to establish "a substantive standard that protects some but not all of a local government's activities," the Committee approved legislation that would provide municipalities with "immediate and certain relief from the potential for catastrophic loss which the trebling provision of the antitrust laws has created." *Id.* at 18. This potential had materialized in January of 1984 when a jury awarded a developer $28.5 million in damages (after trebling) against a county and a village for failing to extend sewer lines to the developer's property. *Unity Ventures v. County of Lake*, No. 81 C-2745 (N.D. Ill. 1984). The alternative approaches considered by the Committee were found to be likely to compound the problems facing local governments because of the risk of "varying and uncertain application by the courts." H.R. Rep. No. 98-965 at 18. Thus, Congress enacted the Local Government Antitrust Act of 1984 in response to concerns raised by representatives of local government that, because of their governmental responsibilities, they could not wait "for the case law to synthesize into a coherent theory." *Id.* at 18. It was Congress' expectation, however, that this Court would clarify these standards. *Id.* at 3.

Three approaches were considered by the Committee. One approach would have established a "legislative immunity for municipalities co-extensive with that of States provided that the local conduct is 'valid under State law' or that 'authority is vested' by the States for such conduct." *Id.* at 13. Citing the confused condition of the state action exemption as it applies to states and the more than fifty reported cases on the state action exemption since the 1980 *Midcal* ruling, the Committee stated that "the antitrust jurisprudence as it applies to States and State

agencies remains case-specific, highly uncertain and, in some areas, undefined" and, as a result, would likely lead to increased litigation if extended to local governments. *Id.* at 13.

A second approach was an exemption for nonproprietary governmental activities from antitrust scrutiny. With respect to this approach, the Committee cited the "interpretive difficulties that some courts have had in applying similar tests based upon the distinction between governmental and proprietary activities" in other areas of law. *Id.* at 15.

A third approach—the so-called municipal rule of reason—was not approved by the Committee for essentially the same reasons. *Id.* at 16. The Committee believed that this proposal would create new uncertainties:

> The difficulty with such a test is that it is unclear as to what kind of evidentiary showing would be required by courts in sustaining a local government's action as being "reasonably undertaken." Whether such a showing could be made on the initial pleadings without extensive discovery is also uncertain. Moreover, to the extent that the subject matter jurisdiction should, as a general proposition, be established by a court as expeditiously as possible, this may not always be possible in complex cases. *Id.* at 17.

Congress acted to reduce the volume of antitrust litigation against local governments, by restricting "private remedies to injunctive relief" under § 16 of the Clayton Act, 15 U.S.C. § 26. H.R. Rep. No. 98-965 at 11, 18; S. Rep. No. 593, 98th Cong., 2d Sess. 2 (1984). That section, while it allows for injunctive relief in cases of violations of § 1 of the Sherman Act, does not provide a right to the type of preemption ruling requested by appellants.

Congress, in enacting the Local Government Antitrust Act of 1984, intended to make it difficult for antitrust

plaintiffs to bring actions against local governments. Specifically, it expected that plaintiffs would be subject to the strict requirements of § 16, including the provision requiring the posting of a bond before a preliminary injunction could be issued by the court:

> While this remedy approach does not create a new substantive test, it does impose a substantial burden on plaintiffs at the outset of litigation. Plaintiffs who fail to secure a preliminary injunction may have to weigh carefully the costs of proceeding with the suit for a final disposition on the merits. Thus, this proposal should work to deter frivolous suits and to readjust the litigation advantages and disadvantages more equitably for local government defendants. H.R. Rep. No. 98-965 at 19.

This Court should deny the appellants' request for a preemption ruling on the ground that it is inconsistent with Congressional intent under the Local Government Antitrust Act of 1984 and is, moreover, procedurally flawed.

II. EVEN IF THE ORDINANCE WERE FOUND INCONSISTENT WITH THE SHERMAN ACT, IT IS NONETHELESS VALID UNDER THE STATE ACTION DOCTRINE.

Amici submit that even if the Court finds that the ordinance is inconsistent with § 1 of the Sherman Act, the ordinance is exempt from antitrust challenge under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). *See also Town of Hallie v. City of Eau Claire*, —— U.S. ——, 105 S.Ct. 1713 (1985); *Southern Motor Carriers Rate Conference v. United States*, —— U.S. ——, 105 S.Ct. 1721 (1985).

States and their local governments are part of a complex intergovernmental system which is based on state constitutional and statutory law, administrative provisions, state court decisions and local ordinances and charters. The state action doctrine attempts to establish the standards under which this array of intergovernmental relations must be evaluated for Sherman Act purposes.

This Court has noted that the cases establishing the state action doctrine "have not been entirely clear." *Town of Hallie*, 105 S.Ct. at 1720. Among other things, there was confusion regarding (1) the use of an "exemption" or "preemption" analysis, *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60 (1982), (Rehnquist, J., dissenting); (2) the degree of "clear articulation and affirmative expression" required of the state, *cf. Town of Hallie*, and (3) whether active state supervision of the actions of local governments (as distinct from the actions of private parties) was required. *Cf. Town of Hallie.*

The doctrine of *Parker*, as applied to the actions of local governments under *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978), *Boulder*, and *Town of Hallie*, confirms that the local government exemption is predicated on the actions of the *state* in setting forth *its* policies regarding the anticompetitive effect of local governmental actions. As this Court recognized in *Town of Hallie*, problems arise from this model because it involves the federal courts in the interpretation of state delegations of authority to their local governments. "Besides burdening the courts, [this review] would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny." 105 S.Ct. at 1719 n.7 (citation omitted).

Town of Hallie and *Southern Motor Carriers Rate Conference* go a long way toward clarifying the requirements of clear articulation and active supervision. The decision in this case could further clarify the state action doctrine.

The City of Berkeley was operating validly under state law, both in its charter provision and under generally applicable state statutes. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261 (1984), *prob. juris. noted*, —— U.S. ——, 105 S.Ct. 2653 (1985). In fact,

an earlier version of this same ordinance, as a charter amendment, has been ratified by a concurrent resolution of both houses of the California Legislature. Cal. Stats. 1972 (Reg. Sess.) res. ch. 96, p. 3372. *See also Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 550 P.2d 1001, 1007 n.2 (1976).

A comparison of the 1972 charter amendment and the ordinance at issue in this appeal shows that they are closely similar. Both the charter amendment and the ordinance provide for the establishment of a board to regulate housing rents. Both establish as base rents the rents charged on a date certain (August 15, 1971 in the case of the charter amendment, and May 31, 1980 in the case of the ordinance). Both allow increases from the base rent under certain circumstances and with the approval of the board. Thus, in broad outline the charter amendment and the ordinance are identical.

While the *Birkenfeld* court had found several deficiencies in the original ordinance and struck it down, in *Fisher* the California Supreme Court found that:

> [T]he ordinance before us now is solicitous of due process. The initiative drafters apparently studied *Birkenfeld*, and took it to heart: every major procedural failing that we noted in the former ordinance has been addressed, and additional procedural protections not previously mentioned have been included. 693 P.2d at 297.

Consequently, this ordinance and its predecessor have twice been before the electorate of the City of Berkeley, twice before the California Supreme Court and, in the earlier version, *affirmatively ratified* by the California legislature.

The current ordinance, unlike the charter amendment, has never been submitted to the California legislature for approval, because this is not required under California law. *See Fisher*, 693 P.2d at 308.

The 1972 ratification of an earlier version of the ordinance clearly evidences that California has a state policy approving the regulation of housing rents by the City of Berkeley. If nothing else, this state scrutiny of the ordinance's predecessor should be "instructive" of the state's intent to authorize its enactment. *Town of Hallie*, 105 S.Ct. at 1719 n.8, citing *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). Appellants can point to nothing in the years between 1972 and the present to indicate a change in this plainly articulated state policy. To the contrary, the California legislature has had the opportunity to invalidate the ordinance, but has declined to do so. In addition, of course, the City of Berkeley is charged by the state with significant responsibilities over housing. It must, for example, include a "housing element" in its general plan. Cal. Govt. Code § 65203(c). It must also use its powers to "make adequate provision for the housing needs of all economic segments of the community." Cal. Govt. Code § 65580(d). Such provisions bring the ordinance within the state action exemption to the Sherman Act.

The lessons of *Town of Hallie*, that courts must take a realistic view of "how legislatures work and of how statutes are written," and that requirements of explicit authorizations by legislatures would have "detrimental side effects upon municipalities' local autonomy and authority to govern themselves," should not be lost here. 105 S.Ct. at 1719. It is important to recognize the variety of constitutional and statutory provisions representing each state's decision on the proper allocation of authority and power between itself and its local governments. Equally important, state supreme court decisions interpreting this intrastate allocation of authority and the validity of delegation should be given considerable deference, as state tribunals have a special, indeed unique, capacity and experience in interpreting the state's constitution and laws. Given the legislative, electoral and state court oversight and approval of Berkeley's ordi-

nance, the Court should find the "clear articulation" and "affirmative expression" required by the Court's decisions from *City of Lafayette* to *Town of Hallie*.

It is clear that "active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party." *Town of Hallie* 105 S.Ct. at 1721. However, the *Hallie* Court also noted that "where state or municipal regulation of a private party is involved, . . . active state supervision must be shown, even where a clearly articulated state policy exists." 105 S.Ct. at 1720 n.10. This dictum in *Town of Hallie*, which did not involve local regulation of any private party, cited *Southern Motor Carriers*, which was decided on the same day. *Southern Motor Carriers*, like *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980),[7] involved state authorization or sponsorship of an essentially private agreement. In this respect, both *Southern Motor Carriers* and *Midcal* differ from this case, which does not involve any agreement among private parties.

Amici submit that the state supervision test is applicable only where a state or local government is authorizing or sponsoring a private agreement that would otherwise violate the antitrust laws. Thus, the state supervision test has no application to the present appeal. In contrast to *Southern Motor Carriers* and *Midcal*, there is no independent private actor here—the individual landlords in Berkeley act at the compulsion of the city government.

Furthermore in *Town of Hallie*, this Court stated that the state supervision test "serves essentially an evidentiary function; it is one way of insuring that the actor is engaging in the challenged conduct pursuant to state

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[7] The inapplicability of *Midcal's* holding to this appeal is discussed at length in this brief at pp. 6-7.

policy." 105 S.Ct. at 1720. In the present appeal, of course, the only true actor is the City of Berkeley. As argued above, Berkeley is acting pursuant to a clearly articulated state policy. Thus, the evidentiary function of the state supervision test is satisfied.

For these reasons, the state supervision test has no application to this appeal, and the ordinance should be held to be within the state action exemption under *Town of Hallie.*

CONCLUSION

For the reasons stated above, *amici* request that the judgment below be affirmed.

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NO. 84-1538

In The

Supreme Court of the United States

October Term, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL, and BERKELEY RENT STABILIZATION BOARD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE STATE OF NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS AMICUS CURIAE IN SUPPORT OF APPELLEES.

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	
THE ANTITRUST PRINCIPLES GOVERNING PRIVATE BUSINESS ACTIVITY SHOULD NOT BE MECHANICALLY APPLIED TO MUNICIPAL RENT CONTROL ORDINANCES DESIGNED TO PROMOTE THE GENERAL WELFARE	13
CONCLUSION	33

TABLE OF AUTHORITIES

CASES	Page
Ake v. Oklahoma, ___ U.S. ___, 105 S. Ct. 1087 (1985)	3
AMN, Inc. v. So.Bruns. Tp. Rent Leveling Board, 93 N.J. 518, 461 A.2d 1138 (1983) .	7
Brunetti v. Borough of New Milford, 68 N.J. 576, 350 A.2d 19 (1975)	15
City of Lafayette v. Louisiana Power and Light Company, 435 U.S. 389 (1978)	19, 25, 32
Community Communications Company, Inc. v. City of Boulder, Colorado, 455 U.S. 40 (1982)	12, 19, 22, 30, 31
Dome Realty v. Paterson, 83 N.J. 211, 416 A.2d 334 (1980)	28
Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, (1961)	21
Fisher v. City of Berkeley, 693 P.2d 261, 278 (Cal. 1984)	19, 23
Harry's Village, Inc. v. Egg Harbor Tp., 89 N.J. 576, 446 A.2d 862 (1982)..	16
Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 350 A.2d 1 (1975)	7, 17

TABLE OF AUTHORITIES-Continued

Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 293 A.2d 720, (Law Div. 1972), affirmed, 62 N.J. 521, 303 A.2d 298, (1973) appeal after remand, 72 N.J. 412, 371 A.2d 34 (1977) 5, 13, 14, 15, 26, 28

Jones v. United States, ___ U.S. ___, 103 S.Ct. 3043 (1983).... 3

Klein v. Califano, 586 F.2d 250 (3d Cir. 1977) 3

Kremens v. Bartley, 431 U.S. 119 (1977). 4

Matter of Egg Harbor Associates, 185 N.J. Super. 507, 449 A.2d 1324 (App. Div. 1982), aff'd., 94 N.J. 358, 464 A.2d 1115 (1983) 6

Mt. Laurel Twp. v. Dept. of the Public Advocate, 83 N.J. 522, 416 A.2d 886 (1980). 4

N.J. Builder's Association v. Mayor of East Brunswick, 60 N.J. 222, 287 A.2d 725 (1972) 28

Orange Taxpayers Council, Inc. v. Orange, 83 N.J. 246, 416 A.2d 353 (1980)..... 17

Overlook Terrace v Management Corp. v. Rent Control Bd., 71 N.J. 451, 366 A.2d 321 (1976). 3

Parham v. J.R., 442 U.S. 584 (1974). 4

TABLE OF AUTHORITIES-Continued

Pennhurst State School v. Halderman, 451 U.S. 1 (1981)... 3
Property Owners Ass'n. of N. Bergen v. Tp. of N. Bergen, 74 N.J. 327, 378 A.2d 25 (1977) 7
Pruneyard Shopping Center v. Robins, 477 U.S. 74, 81 (1980)..... 29
Silkwood v. Kerr McGee Corp., ___ U.S. ___, 104 S.Ct. 615 (1984) 3
So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), cert. denied, 423 U.S. 808 (1975) (Mt. Laurel I).. 2, 6, 16
So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mt. Laurel II) 3, 6, 7, 16, 26, 29
Summer v. Teaneck, 53 N.J. 548, 251 A.2d 761 (1969)..... 14, 18
Sunrise Village Associates v. Borough of Roselle Park, 181 N.J.Super. 565 (App. Div. 1982)..... 28
Town of Hallie v. City of Eau Claire, ___ U.S. ___, 105 S. Ct. 1713 (1985)..... 20, 25, 27

TABLE OF AUTHORITIES--Continued

United Building Construction and Trades Council of Camden County v. City of Camden, ___ U.S. ___, 104 S. Ct. 1020 (1984) 3

Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978)..... 3

N.J.S.A. §§2A:42-74 and 42-77 5
N.J.S.A. 51:27E-2 2
N.J.S.A. 52:27E-28 to 32..... 2
N.J.S.A. 52:27E-29 2
N.J.S.A. 52:37E-30 2
N.J.S.A. 52:27E-31 2
N.J.S.A 52:27E-41.1 to 41.5 ..... 3, 4

15 U.S.C. §§1-7 4
42 U.S.C. §6012 4

Barr, "Guidelines For Drafting Rent Control Laws: Lessons of A Decade," 35 Rutgers L. Rev. 723, (1983)..... 14, 15

Barr, "Rent Control In The 1970's: The Case of the New Jersey Tenants' Movement," 28 Hastings L.J. 631 (1977)..... 15

TABLE OF AUTHORITIES-Continued

Brennan, "State Constitution and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977)..... 30

No. 84-1538

In The
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ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

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CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL, and BERKELEY RENT STABILIZATION BOARD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE STATE OF NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey Department of the Public Advocate (Department), an independent and unique cabinet-level agency of New Jersey state government, N.J.S.A. 51:27E-2,[1] has, for almost eleven years, litigated extensively on behalf of New Jersey citizens in major cases affecting "the public interest."[2] During this

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[1] The Department is specifically empowered to "represent the public interest in such administrative and court proceedings....as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this state inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:37E-30. See also N.J.S.A. 52:27E-31 (factors to be considered in deciding whether to represent a particular public interest).

[2] The Department provides legal representation in a wide range of "public interest" cases through its Division of Public Interest Advocacy, N.J.S.A. 52:27E-28 to 32. See, e.g., So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.

(footnote continued on next page)

period, the Department has participated in a wide variety of proceedings involving issues relating to housing, employment, nuclear power and the rights of the mentally handicapped.[3] The cri-

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(footnoted continued from previous page)
2d 713 (1975), cert. den., 423 U.S. 808 (1975) (Mt. Laurel I) So. Burlington Cty. NAACP v Tp. of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mt. Laurel II) (fair share housing); Klein v. Califano, 586 F.2d 250 (3d Cir 1977) (nursing home funding); Overlook Terrace Management Corp. v. Rent Control Bd., 71 N.J. 451, 366 A.2d 321 (1976) (rent control); Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978) (applicability of public trust doctirne to beach access).

[3] The Department has filed several amicus curiae briefs on behalf of the interests of New Jersey citizens in matters pending before the Court. See, e.g., Ake v. Oklahoma, ___ U.S. ___, 105 S. Ct. 1087 (1985); United Building Construction and Trades Council of Camden County v. City of Camden, ___ U.S. ___, 104 S. Ct. 1020 (1984); Silkwood v. Kerr McGee Corp., ___ U.S. ___, 104 S. Ct. 615 (1984); Jones v. United States, ___ U.S. ___, 103 S. Ct. 3043 (1983); Pennhurst State School v. Halderman, 451 U.S. 1 (1981) (amicus brief filed by Division of Advocacy for Developmentally Disabled of the Department of the Public Advocate, see N.J.S.A.
(footnote continued on next page)

tically important role of the Department as a representative of the public interest of New Jersey citizens has been frequently acknowledged.[4]

The present case raises the issue of whether a city's rent control ordinance that does not result from specific state enabling legislation conflicts with and is, therefore, preempted by the Sherman Antitrust Act (15 U.S.C. §§1-7).

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52:27E-41.1 to 41.5, along with "protection and advocacy systems," see 42 U.S.C. §6012, of forty-four individual states and territories); Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1974).

[4] For example, the New Jersey Supreme Court has characterized the Department as a "shining example of that commitment [by the government to the public interest,]" Mt. Laurel Twp. v. Dept. of the Public Advocate, 83 N.J. 522, 535, 416 A.2d 886, 893 (1980), and of "admirably further[ing] the principles embodied in our Constitution," id. at 536, 416 A.2d at 893, as it fulfills the role of "nourishing and revitalizing our political system," id.

The resolution of this case is particularly important for the municipalities and citizens of New Jersey, since no explicit enabling legislation authorizing local governments to promulgate rent control measures has been enacted in this State.[5] Furthermore, over 100 municipalities in New Jersey have rent control ordinances in effect at the present time. The magnitude of the affordable housing crisis

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[5] Appellants incorrectly represent that the New Jersey Legislature has authorized local governments in the State to enact rent controls, citing N.J.S.A. §§2A:42-74 and 42-77. (App. Br. at 41, n. 20). That is simply not the present state of the law in New Jersey. The thrust of these statutes is directed toward authorizing municipalities to control the rents of substandard dwellings. Contrary to the appellants' representation, these statutory provisions have not been construed to establish a general state policy authorizing municipalities in New Jersey to impose rent control measures in other circumstances. Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 309-10, 293 A.2d 720, 732-33 (Law Div. 1972), affirmed, 62 N.J. 521, 303 A.2d 298, appeal after remand, 72 N.J. 412, 371 A.2d 34 (1977).

in New Jersey was explicitly described in the Mt. Laurel I decision, So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J., at 158-59, 336 A.2d, at 716-17, and, if anything, has been exacerbated since that time. 92 N.J. at 211-212, 456 A.2d at 416-17.

The Department of the Public Advocate has a lengthy involvement and considerable experience in matters relating to the affordability of housing and the legality of rent controls in New Jersey. For example, the Department has represented citizens of New Jersey in cases establishing the constitutional obligation of the State and municipalities to provide realistic opportunities for low and moderate income housing. See, e.g., Matter of Egg Harbor Associates, 185 N.J. Super. 507, 449 A.2d 1324 (App. Div. 1982), aff'd,

94 N.J. 358, 464 A.2d 1115 (1983) (State); Southern Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, cert. den. 423 U.S. 808 (1975) (Mt. Laurel I); Southern Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mt. Laurel II) (municipalities).

Additionally, the Department has represented New Jersey citizens in support of rent control measures designed to address the housing shortage and the economic reality that the housing market is not functioning in the public interest in this State. See, e.g., AMN, Inc. v. So. Bruns. Tp. Rent Leveling Board, 93 N.J. 518, 461 A.2d 1138 (1983); Property Owners Ass'n. of N. Bergen v. Tp. of N. Bergen, 74 N.J. 327, 378 A.2d 25 (1977); Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 350 A.2d 1 (1975).

Vital interests of numerous New Jersey municipalities and their citizens will be directly affected by the decision of this Court on whether local rent control measures are inconsistent with the provisions of the Sherman Antitrust Act.

Consequently, the Department appears as amicus curiae to address the impact upon New Jersey municipalities and, indeed, the entire structure of government in this State if the antitrust standards governing private businesses or cartels are rigidly applied to municipal rent control.

Consent to the filing of amicus curiae briefs has been granted by the parties. A letter to that effect is on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The New Jersey Legislature has not adopted any explicit statute generally authorizing municipalities to adopt rent controls. Nonetheless, the Supreme Court of New Jersey has held that New Jersey municipalities possess the authority, even without a specific State enabling act, to enact rent control ordinances in response to their clear responsibility to protect the general welfare of their citizens. To date, over 100 municipalities in New Jersey have promulgated rent control ordinances under their police powers.

In enacting these rent control measures, municipalities have been motivated by the existence of an acute housing shortage in this State, the widespread imposition of exorbitant rents ("rent gouging"), and monopoly control of the rental housing market. Municipal

rent control ordinances have emerged as a major tool in local efforts to address the acute shortage of decent and affordable housing that plagues many areas of New Jersey. Such ordinances now play a significant role in determining the quality and affordability of housing in New Jersey.

The ability of New Jersey municipalities to promote the general welfare of their citizens will be crippled if antitrust standards developed in the context of private business activity and private conspiracies are held applicable to municipal rent control ordinances in this State. The adverse effects upon local efforts to address the shortage of decent and affordable housing and upon tenants throughout New Jersey would be direct and immediate. Moreover, such a holding would strike at the heart of the ability

of municipalities in New Jersey to take appropriate steps to protect the best interests of their inhabitants in a wide variety of contexts. Additionally, traditional notions of local government would be radically altered, the federal courts would inevitably become extensively entangled in the day-to-day activities of municipalities, and local officials in the proper exercise of their governmental responsibilities would face the daunting, and in many instances, insurmountable obstacle of seeking specific legislative authorization every time they attempt to remedy a local problem by displacing competition with regulation.

Instead of crippling in this fashion the ability of municipalities in New Jersey and elsewhere to respond to demonstrable housing crises or other serious problems within their

borders -- a result that is neither compelled nor contemplated by Community Communications Company, Inc. v. City of Boulder, Colorado, 455 U.S. 40 (1982) or any other decision -- the Court should uphold the judgment of the Supreme Court of California dismissing the claim that the Berkeley rent control ordinance is, on its face, in conflict with the Sherman Act.

ARGUMENT

THE ANTITRUST PRINCIPLES GOVERNING PRIVATE BUSINESS ACTIVITY SHOULD NOT BE MECHANICALLY APPLIED TO MUNICIPAL RENT CONTROL ORDINANCES DESIGNED TO PROMOTE THE GENERAL WELFARE

In New Jersey, there is no explicit state legislative authorization for local governments to enact general rent control ordinances.[6] Notwithstanding the absence of a state enabling act, New Jersey's municipalities possess the authority under their police powers to adopt rent control measures "to deal with the evil of inordinate rent arising out of a housing shortage." Inganamort v. Fort Lee, 62 N.J. 521, 527, 303 A.2d 298, 301 (1973).[7]

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[6] The appellants' assumptions to the contrary about New Jersey law are clearly wrong. (supra at n. 5).

[7] In upholding the rent control ordinances at issue in Inganamort, the New Jersey Supreme (footnote continued on next page)

Presently, over 100 municipalities in this State, or roughly one fifth of all New Jersey municipalities, have enacted rent control ordinances.[8] Such ordinances represent a local

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(footnote continued from previous page)

Court recognized that rent control was clearly a proper subject for local government:

> There is no inevitable need for a single statewide prohibition or for a single statewide enforcing authority. On the contrary, it may be useful to permit municipalities to act, for, being nearer to the scene, they are more likely to detect the practice and may be better situated to devise an approach to their special problems. Inganamort v. Fort Lee, 62 N.J., at 529, 303 A.2d, at 302 (quoting Summer v. Teaneck, 53 N.J. 548, 553, 251 A.2d 761, 764 (1969).

8 Rent Control Survey of New Jersey Municipalities (July 1985) prepared by the Office of Landlord and Tenant Information, Division of Housing and Development, State of New Jersey Department of Community Affairs. See also Barr, "Guidelines for Drafting Rent Control Laws: Lessons of A Decade," 33 Rutgers L. Rev. 723, 725 n. 1 (1983).

response by the municipality to the general welfare of its inhabitants. The rationales for these ordinances include the existence of an acute housing shortage, the widespread imposition of exorbitant rents ("rent gouging"), and monopoly control of the rental housing market. Brunetti v. Borough of New Milford, 68 N.J. 576, 594, 350 A.2d 19, 28 (1975).[9] See also, Barr, supra, 35 Rutgers L. Rev. 726. Indeed, the "desperate need for housing, especially of decent living accommodations economically suitable for low and moderate income families" has long been recognized in

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[9] For background information on the development of municipal rent control in New Jersey as a means of addressing the "exploitation of a housing shortage" in the State, Inganamort v. Fort Lee, 62 N.J., at 531, 303 A.2d at 303, see generally Barr, "Rent Control In The 1970's: The Case of the New Jersey Tenants' Movement," 28 Hastings L.J. 631 (1977).

New Jersey. So. Burlington County NAACP v. Tp. of Mt. Laurel, 67 N.J., at 158-60, 336 A.2d., at 716-17; Mt. Laurel II, 92 N.J. at 211-212, 456 A.2d 416-17.

Regardless of the reasons for their enactment, however, the benefical impact of rent control upon the general welfare and public interest of New Jersey citizens has been evident. Rent control in this State has emerged as an important tool to address the shortage of decent and affordable housing that has chronically plauged portions of New Jersey -- a shortage most recently decried in So. Burlington Cty. NAACP v. Mt. Laurel Tp., 92 N.J., at 212 n. 6, 456 A.2d, at 417 n.6. Rent control ordinances have been variously characterized as a means "to assure fairness in the landlord-tenant relationship," Harry's Village, Inc. v. Egg Harbor Tp., 89 N.J.

576, 584, 446 A.2d 862, 866 (1982); "to regulate the forces of the marketplace to help [the municipality's] residents obtain decent housing within their means," Orange Taxpayers Council, Inc. v. Orange, 83 N.J. 246, 257, 416 A.2d 353, 359 (1980); and to address the fact that "the free housing market was not functioning in the public interest." Hutton Pk. Gardens v. West Orange Council, 68 N.J. 543, 564, 350 A.2d 1, 12 (1975). In short, rent control is one of the most significant weapons in the arsenal available to New Jersey's municipalities to cope with a severe housing shortage and with pressing local problems affecting the general welfare of their citizens.

The adoption of appellants' position, urging the unprecedented application of anti-trust principles fashioned in the context of

private business activity to municipal regulations designed to promote the public welfare, would have a widespread and devastating impact on New Jersey's municipalities and citizens. The ability of municipalities in a state like New Jersey -- one that is partly urban, partly suburban and partly rural -- to promote the welfare of their citizens would be radically eroded by any of the following developments. Yet, all of these directly flow from the approach to the Sherman Act urged by appellants.

First, the capacity of municipalities to respond to the diversity of local problems would be crippled if their legitimate regulatory activities for the public welfare are equated under antitrust laws with the actions or agreements of private cartels. As the California Supreme Court correctly ob-

served, municipalities are unlike a private business: the latter is motivated by a quest for greater profit while a municipality is "generally motivated by the purpose of furthering local health, safety or welfare." Fisher v. City of Berkeley, 693 P.2d 261, 278 (Cal. 1984). Because tne principles of antitrust law are fashioned for regulating private business, such standards cannot be mechanically applied to local regulatory actions serving legitimate governmental objectives. The Court itself has recognized that "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by local government." Community Communications Company v. City of Boulder, 455 U.S. 40, 56 n. 20 (1982), citing City of Lafayette v.

Louisiana Power and Light Company, 435 U.S. 389, 417 n. 48 (1978).

Furthermore, this Court has also reiterated the fundamental distinction between private parties and municipalities:

> We may presume, absent a showing to the contrary, that the municipality acts in the public interest [footnote omitted]. A private party, on the other hand, may be presumed to be acting primarily in his or its own behalf."

Town of Hallie v. City of Eau Claire, ____ U.S. ____ , 105 S. Ct. 1713, 1720 (1985). Consequently, appellants' simplisitic attempt to equate a municipal regulatory regime with the private market would strike a severe, if not fatal, blow at the ability of municipalities to take appropriate steps to protect the general welfare, and would do so without providing any principled analysis of the important differences between municipal actions

and private business activity.

Second, the effect of treating a municipality's regulatory decisions as conspiracies under antitrust laws would be equally destructive. A municipality would be effectively disabled from performing its lawful responsibilities as a democratically elected local unit of government if its displacement of competition with regulation for the public welfare were construed as a vertical conspiracy, in violation of the Sherman Act, between the municipality and those regulated or those who were successful in securing the regulatory action. It clearly would be a legally unprecedented step to apply antitrust principles to those individuals who persuade a local governing body to act or who are victorious in local initiative or referenda. Eastern Railroad Presidents

Conference v. Noerr Motor Freight, 365 U.S. 127, 136 (1961). On the other hand, it would place a straitjacket upon the municipality if the Sherman Act treated as a conspiracy the compulsion of private parties by local government under lawfully enacted municipal regulations. Any regulation of competition in the municipality, such as laws concerning licensing, the regulation of tradesmen, or taxicab charges, would be immediately suspect under the federal antitrust law, however legitimately motivated, and "a municipality's power to regulate the economy would be all but destroyed." Community Communications Co. v. City of Boulder, Colo., 455 U.S., at 67 (Rehnquist, J., dissenting).

Third, municipal governments would be totally disrupted if they were denied the opportunity to present a potent public welfare

defense in the event that the merits of an antitrust action are reached. To limit a municipality's defense of an ordinance solely to the effects on competition, and to divest the local government of the general welfare defense, would wholly eviscerate the municipality's ability to exercise its lawful police powers. The consequences of such an approach are completely illogical. Although the public welfare and the best interests of a municipality's inhabitants are the motives behind municipal action, Fisher v. City of Berkeley, 693 P.2d, at 278, these issues would be deemed wholly irrelevant to an antitrust defense.

The California Supreme Court's decision quite properly avoids this disastrous result by recognizing that "[a]nticompetitive conduct by a municipality in exercise of its legitimate police

power is indeed of a 'different complexion' than similar conduct engaged in by private enterprises" and that "courts must adopt or modify the application of traditional antitrust rules when reviewing the acts of municipal defendants." Id. at 277. Consequently, the appellants' position in this Court, which seek the mechanical application to municipalities of rules of law fashioned in the context of private business regulation, should be rejected as an unrealistic and inflexible approach to the legitimate governmental objectives that underlie municipal regulation.

Fourth, the inevitable consequence of appellants' approach to antitrust law would be a dramatic expansion of the involvement of federal judges in the affairs of local government. Indeed, appellants' position can only lead to the hopeless and excessive

entanglement of federal courts in the day-to-day operations of a municipality. The demands on local officials who are confronting the realities of the pressing problems of their communities, including the critical housing shortage in New Jersey, are overwhelming enough without judges scrutinizing every regulatory action to ensure its consistency with the procompetitive policies of the Sherman Act. Not only would this have a substantial detrimental impact upon the local autonomy of municipalities and their authority to govern themselves, City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 434-35 (1978) (Stewart, J., dissenting), but also it would be undesirable, since such a close appraisal of the justifications for municipal regulatory activities would "embroil the federal courts in. . .

unnecessary interpretation." Town of Hallie v. City of Eau Claire, ____ U.S. ___ , 105 S. Ct. 1713, 1719 n. 7 (1985).

Fifth, municipalities in New Jersey would be completely hamstrung if they were forced to seek specific legislative authorization every-time they were faced with a local housing or economic problem that required municipal regulation. The reality in a State like New Jersey is that the Legislature is part-time, has many other concerns and must be largely responsible to a suburban constituency.[10] Indeed, as the New Jersey Supreme Court observed:

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[10] The New Jersey Supreme Court has carefully documented the "great movement of commerce, industry and people out of the inner cities and into the suburbs." So. Burlington Cty. NAACP v. Mt. Laurel Tp., 92 N.J., at 210 n. 5, 456 A.2d, at 415 n. 5. Thus, the suburban and rural constituency in this State has greatly expanded while there has been a corresponding decline in the population, and legislative influence, of urban areas.

> It is well to keep in mind that our legislators are elected from districts rather than at large. This is a source of strength, but it holds the weakness that a localized problem is less apt than a general one to invite prompt action at the State level.

Inganamort v. Borough of Fort Lee, 62 N.J., at 533, 303 A.2d at 304. For these reasons, the state Supreme Court has emphasized the need to ensure that "local government be equiped to deal with matters of local concern which, if left to state action, might not be met expeditiously or at all." Id. Forcing municipalities to go to the legislature to obtain specific authorization for every regulatory action with possible anti-competitive consequences would not only pose an insurmountable burden, but also would have detrimental effects upon

the municipality's local autonomy. Cf. Town of Hallie v. City of Eau Claire, ___ U.S. ___, 105 S. Ct. at 1719.

If anything, the experience in New Jersey has been that while the state legislature leave power in the hands of the cities to act in order to foster safe, decent and affordable housing, it is ordinarily unwilling to provide specific grants of authority. See e.g., Dome Realty v. Paterson, 83 N.J. 211, 230, 416 A.2d 334 (1980) (municipal ordinance conditioning grant of certificates of occupancy in rental housing in compliance with housing codes); Inganamort v. Fort Lee, 62 N.J. 521, 303 A.2d 298 (municipal rent control); N.J. Builders' Assocation v. Mayor of East Brunswick, 60 N.J. 222, 287 A.2d 725 (1972) (municipal regulation of building

contractors); Summer v. Teaneck Township, 53 N.J. 548, 251 A.2d 761 (1969) (municipal antiblockbusting ordinance); Sunrise Village Associates v. Borough of Roselle Park, 181 N.J. Super. 565 (App. Div. 1981) (municipal ordinance requiring security measures in apartment buildings); Apartment House Council v. Mayor of Ridgefield, 123 N.J. Super. 87 (Law Div. 1973), aff'd., 128 N.J. Super. 192 (App. Div. 1973) (municipal ordinance requiring security deposits by landlords).

This approach is particularly evident where the obligations and burdens imposed upon the municipality are created by the state court's interpretation of the State's own constitution, and the legislature has still failed to act. So. Burlington Cty. NAAPC v. Tp. of Mt. Laurel, 92 N.J.,

at 212, 456 A.2d, at 417. (Legislature has failed for eight years to act on Court's 1975 decree establishing the obligation of municipalities to provide opportunities for low and moderate income housing). In these circumstances, the requirement of express authorization for every municipal regulatory action would signify a disrespect on the part of federal courts for the separate and distinct obligations imposed on municipalities by state constitutions. Cf. Pruneyard Shopping Center v. Robins, 477 U.S. 74, 81 (1980). See also, Brennan, "State Constitution and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977).

The above five factors provide powerful and compelling reasons why antitrust standards governing private business

activity should not be mechanically applied to municipal rent control ordinances designed to promote the public welfare.

In closing, amicus curiae must emphasize that upholding the judgment below will not result in a blanket exemption for municipalities from the antitrust laws. This Court has already held that cities, unlike states, may not exempt themselves from the provisions of the Sherman Antitrust Act. Community Communications Company v. City of Boulder, 455 U.S. 40 (1982). However, in rejecting the use by cities of the "state action" exemption as a shield from federal antitrust policy, the Court certainly did not intend, and nothing in Boulder provides, that the Sherman Antitrust Act was converted into a sword to strike down every municipal rent control ordinance or other

legitimate governmental regulation promulgated without a specific state enabling statute. Indeed, appellants' efforts to transform Boulder into an automatic federal veto of the legitimate exercise of local authority in response to the public welfare is fundamentally at odds with this Court's express admonition that "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." Boulder, 455 U.S., at 57 n. 20 (quoting City of Lafayette v. Louisiana Power and Light Co., 435 U.S., at 417 n. 48.

CONCLUSION

For the reasons stated above, amicus curiae, the State of New Jersey Department of the Public Advocate respectfully submits that the judgment of the Supreme Court of California should be affirmed.

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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL, and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE CALIFORNIA SUPREME COURT

BRIEF IN SUPPORT OF APPELLEES FILED BY AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
I.	STATEMENT OF INTEREST	1
II.	SUMMARY OF ARGUMENT	2
III.	ARGUMENT	3
	A. Neither Berkeley's Ordinance Nor Others Should Be Invalidated on the Record Here	3
	B. Judicial and Legislative History Suggests No Antitrust Concern With Governmental Activities	7
	C. The State Action Doctrine Should Not Be the Only Limit on Local Government Antitrust Liability	8
IV.	CONCLUSION	11

TABLE OF AUTHORITIES

CASES — PAGE

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940) 8
City of Lafayette v. *Louisiana Light and Power Co.*, 435 U.S. 389 (1976) 2, 7, 8
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982) 2, 8
Eastern Railroad Presidents' Conference vs. *Noerr Motor Freight*, 365 U.S. 127 (1961) 7
Fisher v. *City of Berkeley*, 37 Cal.3d 644, 209 Cal.Rptr. 682 (1984) 10
Hozz v. *City and County of San Francisco*, No. 817-405 (San Francisco Superior Court, 1985) 6
Klor's v. *Broadway-Hale Stores*, 359 U.S. 207 (1959) 7
Marjorie Webster Jr. Col. v. *Middle States Ass'n of Colleges*, 432 F.2d 650 (D.C. Cir. 1970) 7
New State Ice House v. *Liebman*, 285 U.S. 262 (1932) 9
Parker v. *Brown*, 317 U.S. 341 (1943) 2, 7
Rice v. *Norman Williams Co.*, 458 U.S. 654 (1982) 8
State of Missouri v. *National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980) 8
Town of Hallie v. *City of Eau Claire*, 105 S. Ct. 1713 (1985) .. 2
Traweek v. *City and County of San Francisco*, No. C-83-5640 TEH (N.D. Cal., filed August 10, 1983) 6

CONSTITUTION, STATUTES AND ORDINANCES

Sherman Act, 15 U.S.C. 1 (1982) ..... *passim*
California Constitution, Article XI, Section 7 7
San Francisco, Ca., Municipal Code, Administrative Code, Ch. 37 (1983) 3, 4, 5

OTHER AUTHORITIES

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H. Rep. 98-965, 98th Cong., 2d Sess. (1984) 8
Housing Production and Performance Under Rent Stabilization, Rent Stabilization Division, Community Development Department, City of Los Angeles (1985) 5
Hamilton, Rabinovitz, Szanton & Alschuler and the Urban Institute, The Los Angeles Rent Stabilization System: Impacts and Alternatives (1985) 4, 5

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Appellees.

BRIEF IN SUPPORT OF APPELLEES FILED BY AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO

I. STATEMENT OF INTEREST

The City and County of San Francisco has a rent stabilization ordinance, although one which differs from that of the City of Berkeley. Many other nontraditional San Francisco legislative programs could also be directly affected by the decision in this case: for example, ordinances regulating the conversion to tourist or non-residential use of hotels and apartments, in order to preserve the housing stock; ordinances imposing fees on new commercial development to recoup part of the cost or demand such developments impose on transit, housing and other services; an ordinance regulating escort services (primarily women who "escort" male visitors); an ordinance regulating conversion

of full-service gasoline stations to self-service; an ordinance concerning City contracts with minority and woman-owned business enterprises. None of these ordinances is specifically mandated by the State of California; all affect commercial competition. San Francisco, like Berkeley, is a California charter city, whose authority under state law generally parallels that of the City of Berkeley.

II. SUMMARY OF ARGUMENT

The judicial and legislative history of the federal antitrust law makes it clear that the Sherman Act was not intended or designed to control the acts of government *qua* government at any level. *City of Lafayette* v. *Louisiana Light & Power Co.*, 435 U.S. 389 (1976) signaled that where governments step into the shoes of private economic actors, they may be challenged if they take advantage of their governmental status to engage in acts prohibited to their private competitors. *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40 (1982) gave warning that governments might not escape challenge, merely because they were acting within their authority under state law, if they took steps which could improperly favor one private competitor over another. Appellants in this case take a giant step further. They ask the Court to invalidate a regulation which advances no interest which government has in common with private economic actors and which favors no one private party against its competitors.

San Francisco agrees with respondent City of Berkeley that the Berkeley rent law is protected under the Sherman Act by *Parker* v. *Brown,* 317 U.S. 341 (1943) and *Town of Hallie* v. *City of Eau Claire,* 105 S. Ct. 1713 (1985). However, the "state action" doctrine of those two cases cannot by itself separate all local government activity which is consistent with federal antitrust law from activity which contravenes antitrust policies. The California Supreme Court correctly recognized that local government action cannot be considered and judged as if it were that of a private actor or actors, irrespective of how specifically it is authorized under state law. This brief argues that where local government does not act to further its own economic interest as a competitor with private enterprises, and

does not improperly favor one private competitor over another, it should not be subject to scrutiny under federal antitrust law. State action analysis alone cannot insulate from antitrust defeat legitimate local government activity which is innovative, which is unquestionably proper but not favored by a statewide political majority, or which is simply sufficiently controversial that state bodies take no action to mandate or disapprove it.

Appellants make much of the supposed evils of "rent control." Such factual matters should have been raised in the state trial court, not by interjecting a new issue on appeal, as appellants did here. The Court should decline appellants' invitation to invalidate in the abstract a wide range of local rent laws. In its experience with rent regulations, San Francisco has seen evidence of benefits and no evidence of any economic effect which should be of concern under the federal antitrust laws. Focusing narrowly on "rent control" also distracts attention from the full significance of appellants' analysis, which would invalidate many other programs.

III. ARGUMENT

A. Neither Berkeley's Ordinance Nor Others Should Be Invalidated on the Record Here

Perhaps because supporting legal authority is scant, appellants' argument rests in significant part on conclusory claims about the evils of "rent control." While this brief cannot address either "rent control" in the abstract or the effects of Berkeley's rent law, it is possible to explain briefly the workings of San Francisco's rent law, as one example of "rent control." Such an examination casts profound doubt on any blanket claim that rent regulation as such falls afoul of the antitrust laws.

San Francisco's rent law[1] affects rents only while the same tenants keep their apartments (Ordinance Section 37.3A(a)).

[1] The full text of the law appears as Chapter 37 of the San Francisco, Ca., Administrative Code (1983), a division of the Municipal Code. Recognizing that no San Francisco ordinance is at issue, that the role of this amicus curiae brief is necessarily limited and that great demands are placed on the Court's time and attention, the text of this ordinance and the five others briefly described in the text have not been filed. The text of any or all of the ordinances mentioned will promptly be furnished to the Court and all parties if the Court requests, or to any party appearing in this case on that party's request.

Vacant apartments may be rented for any amount a landlord and tenant choose. During approximately two-and-one-half years after San Francisco adopted its rent law in 1979, more than half of San Francisco's rental units changed hands at least once.[2] Rents for most units are thus periodically completely freed from regulation.

In addition, rents for apartments which continue to be occupied by the same tenants may be raised without application and as a matter of right, according to the rate of inflation (with a floor of four percent annually and a ceiling of seven percent annually).[3] Ordinance §37.3A(a)(1). Increased utility costs may be recovered as a matter of right. Ordinance §§37.2(o), 37.2(s), 37.3A(a)(4). Additional increases are available, following application and hearing, to recover the cost of capital improvements (Ordinance §§37.3A(a)(3), 37.7(a)), to recover unusual increases in operating costs (Ordinance §§37.3A(a)(6), 37.8(e)(4)(A)), to equalize rents of comparable units (Ordinance §§37.3A(a)(6), 37.8(e)(4)(B)) and to insure a fair return (Ordinance §37.8(f)(3)).

No comprehensive study has been done of the effects of San Francisco's rent law. However, a study was completed in April, 1985 for the Los Angeles rent law (enacted in 1979, following a 1978 rent increase moratorium).[4] Like San Francisco's law, the Los Angeles law does not control vacant apartment rents, allows an inflation-based annual increase as of right and allows recovery of utility cost increases and capital improvements costs. It does not provide specific relief for cost increases or to equalize rents of comparable units, as San

[2] Bureau of the Census, U.S. Dept. of Commerce & U.S. Dept. of Hous. & Urban Dev., Current Housing Reports No. H-170-82-39, Annual Housing Survey: 1982, San Francisco-Oakland, Ca. (Aug. 1984), Table A-1, p. A-5. The statistic in question also includes the smaller City of Oakland, which has a rent ordinance somewhat similar to San Francisco's.

[3] The inflation adjustment is reduced to take partial account of the historical limitation of landlords' variable costs to a fraction of gross rents.

[4] Hamilton, Rabinovitz, Szanton & Alschuler and The Urban Institute, The Los Angeles Rent Stabilization System: Impacts and Alternatives (April, 1985; available from the Rent Stabilization Division, Community Development Department, City of Los Angeles) [hereinafter the "Los Angeles Report"].

Francisco does, though it does provide for increases to assure a fair return. Among the major conclusions of the Los Angeles study were:

1. Rent regulation had not greatly affected the aggregate rent received by Los Angeles landlords as a whole. Los Angeles Report at 12, 32.

2. Rent regulation had shifted rents as among tenants, benefitting long-term tenants but, because of decontrol on vacancy, raising the rents of recent movers. Los Angeles Report at 32-33.

3. Elderly, single-member and low-income households benefitted the most. Los Angeles Report at 49.

4. Tenants valued the security gained by regulating rent increases as much as or more than any financial saving. Los Angeles Report at 48.

A companion report found that Los Angeles landlords' operating income continued to be healthy, and that there was little evidence that maintenance of rental properties had been affected. Housing Production and Performance Under Rent Stabilization, Rent Stabilization Division, Community Development Department, City of Los Angeles (April 1985), 3-4. Like San Francisco's, the Los Angeles rent law exempts new construction (San Francisco Ordinance §37.2(p)(6)).

These conclusions suggest that a rent law like San Francisco's does not substantially affect long-term market performance, while having benefits which are within the appropriate sphere of local government and which can be legitimately seen by a reasonable local governing body as outweighing the arguable economic effects. Certainly in a context of rapidly rising rents, as has existed in San Francisco and Los Angeles, relatively small changes in overall rents may be justified in order to provide a measure of stability to long-term tenants, who are disproportionately elderly and low-income, and to provide greater predictability to all tenants. There is no occasion to invalidate "rent control" in any specific form or in

general on the factual record before the Court.[5] It is exceedingly doubtful that such questions should ever be resolved under the antitrust laws. The difficulty of deciding such issues with due sensitivity to the legislative choices of local governments argues powerfully against extending antitrust scrutiny to governmental actions in general.

Similar difficulties would arise with other San Francisco ordinances, like those noted in the Statement of Interest of this brief. Those ordinances are, San Francisco believes, wholly proper under state law yet—on appellants' interpretation at least—may not be authorized or contemplated by the state. Appellants' arguments would sweep up those programs, and other programs in other cities, along with the Berkeley rent law.

Most government programs can be analogized to private agreements which would violate the antitrust laws. Such analogies are a poor substitute for meaningful analysis. Governments do not share the interests and motivations of private economic actors.

Private parties could not, taking one possible comparison with San Francisco's residential conversion laws, agree to stay in one line of business and not enter another. Private parties could not, as on one view of San Francisco's housing and transit fee ordinances, agree each to pay identical charges as a condition of doing business. Private parties could not, as in one view of San Francisco's gasoline station ordinance, agree to remain in one line of business and change to another only under identical procedures. Private parties could not, as in one view of San Francisco's "escort" service ordinance, agree to all maintain and make available identical information about their customers. Private parties could not, as in one view of San

[5] San Francisco has defended its rent law against an antitrust challenge in a trial on the merits, in a case entitled *Hozz* v. *City and County of San Francisco*, San Francisco Superior Court No. 817-405, judgment entered April 23, 1985, notice of appeal filed July 3, 1985. The trial lasted 18 days before a judge and involved extensive expert testimony for which the City incurred fees of approximately $60,000.00. The ordinance was upheld.

Another and perhaps more dramatic example of the costs of defending municipal antitrust actions is *Traweek* v. *City and County of San Francisco* , No. C-83-5640 TEH (N.D. Calif., filed August 10, 1983). In that case, challenging an amendment to San Francisco's condominium ordinance, the City has employed outside counsel whose fees to date exceed $300,000. Discovery is now proceeding in the case.

Francisco's minority business ordinance, agree on and enforce any form of differential consideration for minority entrepreneurs.[6] These programs, like rent regulations, deserve individual and factual scrutiny, not conclusory antitrust labelling. Their wisdom is a legislative matter, not ready subject matter for the Sherman Act.

B. Judicial and Legislative History Suggests No Antitrust Concern With Governmental Activities

Perhaps the best evidence of the intended inapplicability of the Sherman Act to local governmental activities in general is that, for the nearly ninety years from its enactment in 1890 (ch. 647, 26 Stat. 209) to *City of Lafayette* in 1978 (435 U.S. 389), there was no precedent for liability for such activities. Courts which commented on the scope of the antitrust laws dismissed the prospect of antitrust sanctions other than for business or commercial activity. The Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 213 n. 7 (1959). Activity "distinct from the sphere of commerce" falls outside the Sherman Act unless governed by commercial motives. *Marjorie Webster Jr. Col.* v. *Middle States Ass'n of Colleges*, 432 F.2d 650, 655 (D.C. Cir. 1970), *cert. denied* 400 U.S. 965 (1970). "Where a restraint upon trade or monopolization is the result of valid governmental actions, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 136 (1961). The Sherman Act is aimed at business combinations by individuals and corporations, not governmental action. *Parker* v. *Brown*, 317 U.S. 341, 351-352 (1940).

[6] Ordinances which, if viewed as private economic actions, potentially contravene antitrust standards could be listed almost infinitely. Because much of California local governments' activity (including traditional zoning) is directly authorized only by a broad constitutional grant (California Constitution, Article XI, §7) much of such a list would not be state-authorized under appellants' analysis. The examples given in the Statement of Interest and the text above are limited to recent City ordinances with non-traditional subject matter which therefore appear most vulnerable to a claim they lack any direct or indirect state mandate.

Legislative history was generally understood to suggest a similar result. "The restraints at which the Sherman Law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law . . ." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 498 (1940). The House Committee on the Judiciary found no reported case in which a "body politic", like a local government, as opposed to a private person or corporation, was subject to historical restraint of trade statutes. H. Rep. 98-965, 98th Cong., 2d Sess. (1984), at 5, n.2. "[T]he indication is that it was the competitors in commerce that Senator Sherman had in mind as the concern of his bill, not noncompetitors motivated socially or politically in connection with legislation." *State of Missouri* v. *National Organization for Women,* 620 F.2d 1301, 1309 (8 Cir. 1980), *cert. denied* 449 U.S. 842 (1980).

No recent decision of the Court has repudiated these principles. The Court has yet to find a local public entity has violated the antitrust laws, even by an activity not purely governmental. *See Boulder,* 455 U.S. at 56, n. 20; *Lafayette,* 435 U.S. at 417, n. 48. *City of Lafayette* and *Boulder* suggest, at most, that prior rulings and legislative intent may not protect actions by public entities which are also private competitors, or which take the part of one private competitor against another. The intended scope of the Sherman Act, and the accumulated learning of Sherman Act precedents, do not reach activity by governments as such, like the Berkeley rent law.[7]

C. The State Action Doctrine Should Not Be the Only Limit on Local Government Antitrust Liability

Somewhat ironically, *City of Lafayette* and *Boulder,* two principal authorities cited for extending local government antitrust liability to purely governmental actions, simply reject blanket application of one defense, the so-called "state action" exemption. The "state action" doctrine on which *City of Lafayette* and *Boulder* turn is far from a sufficient test for ultimately determining municipal antitrust violation. Dis-

[7] Whether the Court views this case as raising solely a pre-emption issue (*see Rice* v. *Norman Williams Co.,* 458 U.S. 654, 659 (1982)) or an issue of "violation" of the Sherman Act, the Berkeley rent law still lies outside the scope of the Sherman Act.

qualification for the exemption does not imply an antitrust violation. The state action doctrine should not supplant traditional limitations on applying the antitrust laws to non-commercial activities.

The "state action" doctrine, applied as an exclusive test, would powerfully undercut the autonomy of local government. It would also systematically impede local governments' ability to fulfill their roles as innovators. Cf. *New State Ice House Co.* v. *Liebman,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). It would frustrate local responses to problems which were controversial on the state level. Finally, it would cast state legislators and judges in the unlikely role of ultimate arbiters of municipal antitrust liability.

Most municipal activity would be prohibited by the antitrust laws if accomplished by private agreement. Local police forces are monopolies; other persons' rights to make arrests, patrol public places and initiate prosecutions are narrowly limited. Public streets are monopolies; tax funds for maintenance, rights of way and traffic control are denied to competitive networks. The superficial facility with which antitrust analysis can be applied to rent control is but one illustration of how the bulk of local government activity can be called into question by using traditional antitrust categories, appropriate for private competitors. The premise of government is not competition. The premise of government is that the public may undertake, by democratic means, tasks which would be impossible or inappropriate for private citizens.

Important classes of local actions would be jeopardized by judging local government by the assumptions of competition, even with a "state action" exemption. Contemplation or authorization by state legislatures or courts will probably save the bulk of traditional local government activity from being overturned under the Sherman Act. However, local actions which faithfully reflect local judgments of proper public policy would still be subject to antitrust challenge where state bodies disagree. The State of California has 441 incorporated municipalities, 58 counties and thousands of other local government entities, of widely varying size, character and political com-

plexion. No principle of existing law prohibits otherwise proper local policies which do not coincide with statewide political consensus. If only a specific state mandate can protect local action under the Sherman Act, however, this state law rule of autonomy will be displaced wherever local government action affects the economy—as it usually does.

Moreover, local innovations which state bodies simply had not anticipated—and which state bodies might prefer to see tested in practice before taking any position—would likewise be subject to antitrust challenge. Neither antitrust precedent nor policy calls for antitrust law to determine when local autonomy is permitted or which local innovations may survive.

"State action" doctrine is also unserviceable in determining municipal antitrust liability where a local policy is controversial at the state level. Legislative action on controversial issues—either pro or con—is often stymied. Neither antitrust precedent nor sound policy calls for invoking federal antitrust law to determine the fate of local government action when controversy at the state level results in inaction, or inconclusive action.

Exclusive reliance on the "state action" doctrine would also make state legislators the ultimate arbiters of antitrust law as it applies to local governments. There is no reason to believe they are specially qualified so to act. The "state action" doctrine rightly recognizes that federalism demands that the states be able to protect constituent local governments from antitrust challenge while the localities carry out state-authorized programs. The ability to torpedo local programs by failure to contemplate or authorize them within the meaning of the antitrust laws is not similarly necessary nor beneficial to federalism. States and the statewide citizenry already have state law powers to limit local action.[8] On the other hand, if state authorization or contemplation is the *sine qua non* for antitrust survival, state legislators and judges will find themselves deciding—wittingly or unwittingly--antitrust issues when they act

[8] Indeed, one result of applying commercial antitrust rules to local government, mitigated solely by the "state action" exception, would be to largely supplant the law which each state has developed to delineate the powers of its localities. *See*, e.g., the discussion of state law pre-emption in the California Supreme Court decision in this case, *Fisher* v. *Berkeley*, 37 Cal.3d 644, 704-709, 209 Cal.Rptr. 682, 729-732 (1984).

on division of state and local authority. Such debates are unlikely either to contribute to consistent antitrust results or successfully accommodate local autonomy and competition.

IV. CONCLUSION

San Francisco agrees that rent control, in California now, is authorized and contemplated by the state. However, the California Supreme Court was right to recognize that other legal principles, applicable in this case, also called for upholding on antitrust grounds the ordinance challenged here. Those principles are outlined in prior cases which suggested limiting antitrust liability to commercial, as opposed to strictly governmental, activities. In this case, where the City of Berkeley is not an economic competitor and where it has not favored one competitor as against others, the Court should reject the antitrust challenge, irrespective of the "state action" doctrine.

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Respectfully submitted,

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